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IN THE

Supreme Court of the United States

October Term, 1952

No. 497

SEATRAIN LINES, INC.,
Petitioner,

vs.

PENNSYLVANIA RAILROAD COMPANY, ATLANTIC COAST LINE RAILROAD COMPANY, LOUISVILLE & NASHVILLE RAILROAD COMPANY, SOUTHERN RAILWAY COMPANY, BALTIMORE AND OHIO RAILROAD COMPANY, SEABOARD AIR LINE RAILROAD COMPANY, ERIE RAILROAD COMPANY, ASSOCIATION OF AMERICAN RAILROADS,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT, BEFORE THE RENDITION OF JUDGMENT IN THE COURT OF APPEALS

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Dated: December 10, 1952.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT, BEFORE THE RENDITION OF JUDGMENT IN THE COURT OF APPEALS

Seatrain Lines, Inc. respectfully prays that a writ of certiorari be issued to review judgments of the District Court of the United States for the District of New Jersey, before the rendition of judgment by the Court of Appeals.

Opinion Below

The opinion of the District Court (R. pp. 593-622, 624-625) has not yet been reported.*

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* Since the filing of this petition, the opinion of the District Court has been reported: *Seatrain Lines, Inc.* v. *Pennsylvania R. Co., et al.*, 108 F. Supp. 113.

Jurisdiction

The judgment of the District Court was entered against all respondents other than respondent Louisville & Nashville Railroad Company on November 12, 1952, and against said respondent on November 21, 1952 (R. pp. 623, 625-626), dismissing a complaint (R. pp. 1-45) which sought injunction and damages for a conspiracy in violation of the antitrust laws and denying petitioner's motion for a preliminary injunction (R. pp. 57-61), on the ground that the Interstate Commerce Commission had exclusive jurisdiction of the subject matter. Separate judgments of dismissal, without prejudice, were entered as against four other railroads originally named as defendants, on February 1, 1952, November 21, 1952, December 3, 1952 and December 8, 1952 respectively (R. pp. 45, 632-633); and the action was dismissed without prejudice against six traffic associations originally named as defendants, on April 26, 1952 (R. pp. 632-633). Appeal was docketed in the Court of Appeals for the Third Circuit on November 25, 1952 (Ct. App. Docket Entry under date Nov. 25, 1952). The jurisdiction of this Court is invoked under Section 1254 of the Judicial Code, as amended (28 U. S. C. Sec. 1254).

Questions Presented

The broad question involved in this case is whether the District Court erred in holding that it lacked jurisdiction of the subject matter of the complaint herein which alleges a combination and conspiracy to monopolize and restrain interstate trade and commerce in the transportation of freight. The Court's holding that it lacked jurisdiction was based solely upon its holding that the Interstate Commerce Commission had exclusive subject-matter jurisdiction as to all of the various means alleged to have been employed in carrying out the conspiracy. The particular questions presented thus concern the Interstate Commerce Commission's jurisdiction over such means, specifically two of them. The questions are:

1. Whether the District Court erred in holding that the Interstate Commerce Commission has jurisdiction to require a railroad to permit the interchange and use of its cars in the transportation of freight in interstate commerce by a water carrier when such railroad does not participate in and maintain through routes with such water carrier, it appearing that the Interstate Commerce Commission had already decided in proceedings between the same parties that its jurisdiction to require such interchange and use was limited to cars of railroads participating in and maintaining through routes with such water carrier.

2. Whether the District Court erred in holding that the Interstate Commerce Commission has jurisdiction to award reparation for the damages caused petitioner by respondents' use of unfair competitive practices not prohibited or declared to be unlawful or otherwise mentioned in the Interstate Commerce Act. This question is squarely raised by the allegation (R. pp. 31-33) that defendants have utilized available administrative and court procedures, in bad faith or without probable cause, know-

ingly or recklessly misrepresenting facts therein, making misleading statements of fact therein, multiplying and protracting proceedings thereunder, in bad faith or without probable cause, not to obtain settlement of issues, but with the intended effect of continuing and creating doubts and uncertainties, all for the purpose of preventing future diversion of all-rail traffic to petitioner.

Statutes Involved

The Statutes involved are Section 7 of the Sherman Antitrust Act (15 U.S.C. Section 15), Section 16 of the Clayton Act (15 U.S.C. Section 26) and Sections 8 and 16(1) of the Interstate Commerce Act (49 U.S.C. Sections 8 and 16(1)); the following sections of the Interstate Commerce Act are referred to by the District Court (R. pp. 612-614, footnote 4) as bearing upon the Interstate Commerce Commission's jurisdiction: 1(4), 1(10), 1(13), 1(14)(a), 3(4), 7, 15(3) and 305(b), (49 U.S.C. Sec. 1(4), 1(10), 1(13), 1(14)(a), 3(4), 7, 15(3) and 905(b)). The texts of said statutes, and of the declaration as to the National Transportation Policy prefixed to The Transportation Act of 1940, are reproduced in Appendix A hereof.

Statement

This action arises under the antitrust laws of the United States, specifically Sections 1 and 2 of the Sherman Act, and invokes the remedies provided in Section 7 of the Sherman Act and Section 16 of the Clayton Act (R. p. 1).

(A) The Conspiracy Charged, the Relief Sought, and the District Court's Dismissal and Denial.

The complaint seeks damages caused by, and injunctive relief against, an alleged combination and conspiracy by defendant and other railroads, and defendant Association of American Railroads, to monopolize in the hands of railroads the transportation of freight in interstate trade and commerce, and to restrain and limit the competition of Seatrain, a water carrier, with railroads, in such commerce, by restraining and limiting petitioner's development, growth and expansion, and if possible, driving petitioner out of business as a competitor of railroads in such commerce (R. pp. 16-17).

The claim for damages[1] is based solely upon petitioner's loss of earnings resulting from the restraint upon petitioner's growth and expansion as a competitor effected by the combination and conspiracy (R. pp. 35-37, 43).

The amended complaint originally prayed for broad injunctive relief, not only against the combination and conspiracy itself, but against the numerous means alleged to have been concertedly employed in carrying it out (R. pp. 37-42); however, in order to bring certain of the jurisdictional issues into sharp focus, all other prayers for specific injunctive relief were withdrawn at the hearing except those directed against two particular types of means utilized in carrying out the conspiracy, namely, (1) the concerted exclusion of Seatrain from the benefit of the railroads' joint arrangements for the use and interchange of freight cars owned by railroads which do not participate in and maintain through routes with Seatrain, and (2) the concerted use of unfair competitive practices which are not prohibited or declared unlawful or even mentioned in the Interstate Commerce Act (R. pp. 43-45, 624-625).

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[1] Asserted against respondents Pennsylvania, Atlantic Coast Line, Louisville & Nashville, and Southern railroads, herein and in the complaint called the "primary defendants."

Petitioner moved for preliminary injunction to restrain the aforesaid exclusion from the benefits of arrangements and agreements as to use and interchange of cars (R. pp. 57-61). Respondents moved to dismiss the complaint on the grounds that exclusive jurisdiction over the subject matter of the action is vested in the Interstate Commerce Commission (R. pp. 46-55, 441-442, 631). Argument on both motions was heard on April 14, 1952 (Relevant District Ct. docket entry under date Apr. 29, 1952).

The District Court held that it lacked jurisdiction to give any of the relief sought, either by injunction or damages, on the ground that the Commission had exclusive jurisdiction with respect thereto (R. pp. 593-622, 624-625); it granted respondents' motion to dismiss the complaint and denied petitioner's motion for preliminary injunction (R. pp. 623, 625-626).

(B) Question No. 1: The Conflict of Decision Between the Commission and the District Court.

Petitioner (herein sometimes called Seatrain) operates as a common carrier by water of commodities generally in interstate commerce between the Port of New York and the Ports of New Orleans, Texas City and Savannah, under due certifications and authorization by the Interstate Commerce Commission (R. pp. 8, 72).

Seatrain now owns seven "Seatrain-type" vessels, specially designed and constructed for the carriage of freight in railroad cars. The cars are loaded bodily into the Seatrain vessels from adjacent tracks on the docks by special hoisting equipment at the terminals where Seatrain owns and maintains physical equipment for the interchange of freight cars with its rail connections (R. pp. 9, 72-73).[1]

Arrangements and agreements among the railroads of the United States have existed for many years under which railroad-owned freight cars[2] are interchanged and used in interstate commerce by all railroads and water carriers except Seatrain, without restriction (R. pp. 11-14, 76-78, 126). This exclusion of Seatrain as a means used to carry out the alleged conspiracy is charged to be unlawful not merely as a means used in furtherance of the larger conspiracy to monopolize and restrain trade, but as in itself an unlawful monopolization (R. pp. 16-18, 21-29).

One of the devices employed by the railroads to implement this exclusion was their adoption and promulgation, through their Association, in 1932, of Car Service Rule 4, reading (R. pp. 88-90, 139, 383):

> "Cars of railroad ownership must not be delivered to a steamship, ferry or barge line for water

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[1] For a further description of the Seatrain operation and the advantages of its services to the public, the Court is respectfully referred to its opinion in *United States* v. *Pennsylvania R. Co.*, 323 U. S. 612, at pp. 613 *et seq.*

[2] Constituting over 98% of all freight cars (affidavit of A. F. Swinburne, R. p. 460).

> transportation, without permission of the owners filed with the Car Service Division."

The subsequent Commission finding that "the sole object of the Association of Railroads' rule was to prevent diversion of traffic from the railroads to Seatrain", is cited in the opinion of this Court in *United States* v. *Pennsylvania R. Co.,* 323 U. S. 612, at page 614.

Promptly after the Rule was promulgated, Seatrain's connecting carriers initiated proceedings before the Interstate Commerce Commission,[3] alleging that the rule, and the railroads' refusal to permit interchange of their cars with Seatrain thereunder, were unlawful under the Interstate Commerce Act. Seatrain intervened. The railroads opposed, claiming among other things that the Commission had no jurisdiction to require interchange of railroad-owned cars with Seatrain (R. pp. 100-101).

The Commission held (*Investigation of Seatrain Lines, Inc.,* 206 I. C. C. 328, 1935):

> "We find nothing in the act imposing any duty upon or giving us jurisdiction to require a rail carrier to permit delivery of its cars to a water carrier where through routes between such rail and water carriers do not exist.
>
> * * *
>
> "There is no duty to interchange cars with Seatrain resting on those defendants who are not parties to through routes with it . . ." (p. 343)

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[3] I. C. C. Docket Nos. 25728 and 25878.

The Commission held, however, that under its power over "through routes," it had jurisdiction to require a railroad which was a party to a through route with a water carrier to interchange its cars with such water carrier in connection with the operation of such through route (pp. 343, 344).

On January 28, 1938 (226 I. C. C. 7) the Commission repeated its earlier finding, saying (p. 30):

> ". . . we may not, in the absence of through routes, require it [a rail carrier] to furnish cars that are to be delivered to a water carrier contrary to the express directions of the owners of the cars."

Those proceedings initiated in 1932 continued (with the injection of additional issues and many complications and delays (R. pp. 104-107)) until, on October 13, 1941, the Commission ordered defendants in said proceedings

> "*according as they participate in through routes* with complainants and Seatrain Lines, Inc., in interstate commerce via Belle Chasse, La., and Hoboken, N. J. . . . to abstain from observing and enforcing their present rules, regulations and practices which prohibit the interchange of their freight cars with complainants herein for transportation by Seatrain Lines, Inc. in interstate commerce." (Ex. 31 to aff., R. pp. 298-299, emphasis supplied).

This order was appealed by certain railroads, and its effectiveness automatically suspended thereby, until this Court upheld it in all respects on January 29, 1945 (*United States* v. *Pennsylvania R. Co.,* 323 U. S. 612).

This order, as it showed on its face, was based upon the Commission's limited authority to require those (and only those) railroads which participate in and maintain through routes with Seatrain to permit their cars to be delivered to Seatrain "according as they participate in [such] through routes."

Thus, from 1932 to 1945, Seatrain sought to obtain the privilege of carrying the very railroad cars which carry freight to its ports, but was unsuccessful in its attempts to obtain such right except as to cars owned by railroads which participated in through routes with Seatrain. The number of cars owned by railroads which participate in through routes with Seatrain is but a fraction of the total number of railroad-owned cars which are available for use by every other carrier in the United States engaged in interstate commerce (R. pp. 126-130 and Ex. 40 to aff., at R. p. 333). Without the privilege of carrying the very railroad cars which carry freight to its ports, Seatrain's type of service cannot be rendered to the public except to a limited extent. As this Court pointed out in *United States* v. *Pennsylvania R. Co., supra* (at pp. 616-617):

> "The interrelationship of the three parts of the [Interstate Commerce] Act was made manifest by its declaration of a 'national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act, so administered as to recognize and preserve the inherent advantages of each' . . .
>
> "This policy cannot be carried out as to Seatrain's interstate carriage unless railroads interchange their cars with it. The particular type of

> service introduced by Seatrain, and found by the Commission to be qualitatively superior, cannot be rendered without the privilege of carrying the very railroad cars which carry freight to its ports. The 'inherent advantages of this service' would be lost to the public without railroad car interchange."

On November 13, 1951, the Interstate Commerce Commission granted Seatrain temporary authority to operate a new service between the Ports of New York and Savannah, saying (R. pp. 123-124, Annex C to aff., R. p. 185):

> "We find that there is an immediate and urgent need for applicant's proposed service as a common carrier by self-propelled vessels in the transportation of commodities generally between the Ports of New York and Savannah, and that there is no carrier service capable of meeting such need."

Seatrain inaugurated regular service pursuant to this authority on November 30, 1951 (R. p. 124). The Record shows that it was promptly confronted with a new series of obstructions and obstacles by concerted action of the respondents and other railroads (R. pp. 131-148).

Accepting the limitations on the Commission's jurisdiction established by the foregoing decisions, Seatrain brought this action under the antitrust laws to obtain the right to carry "the very railroad cars which carry freight to its ports," which are not owned by railroads participating in or maintaining through routes with Seatrain,—which right is essential in order for Seatrain to give the public the "inherent advantages" of its service. Respondents thereupon completely reversed their contentions which they had urged over many years before the Commission and this Court[1] (R. pp. 528-586); see also *United States* v. *Pennsylvania R. Co., supra,* p. 615. And now the District Court has upheld their new contention that the Court has no jurisdiction under the antitrust laws because the Commission has exclusive jurisdiction under the Interstate Commerce Act.

The final decision of the Commission was made,[2] and its order issued thereon, on October 13, 1941—a year after the passage of the Transportation Act of 1940. Since the passage of that Act, there have been no amendments to the Interstate Commerce Act which pertain in any way to the jurisdiction of the Commission herein involved. Therefore, the District Court's holding that the Commission now has exclusive jurisdiction must also be that the Commission has had exclusive jurisdiction at least since the passage of the Transportation Act of 1940.

(C) Question No. 2: The Commission's Power to Grant Reparations.

The complaint alleges numerous means used by the defendants to carry out the conspiracy. Some of the acts so charged as means were subject to the jurisdiction of the Interstate Commerce Commission; others were not (R. pp. 17-35).

The complaint alleges in paragraphs 56, 57 and 58 (R. pp. 31-33) that defendants concertedly utilized available administrative and court procedures in bad faith or without probable cause, knowingly and recklessly misrepresenting facts therein, making misleading statements of fact therein, multiplying and protracting proceedings thereunder, in bad faith or without probable cause, not for the purpose of obtaining settlement of issues, but with the intended effect of continuing and creating doubts and uncertainties, all for the purpose and with the effect of preventing future diversion of all-rail traffic to Seatrain in furtherance of the conspiracy.

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[1] Respondents Baltimore and Ohio, Erie and Association, though parties to the I. C. C. proceedings, were not parties to the appeal.

[2] *Hoboken Mfrs. Railroad Company* v. *Abilene and Southern Railway Company,* 248 I. C. C. 109.

The District Court held that the damages inflicted by the employment of these means in carrying out the alleged conspiracy were not recoverable under the antitrust laws because:

> ". . . They must follow the major charge as being within the jurisdiction of the Commission.
>
> "Neither can this Court maintain jurisdiction over the suit insofar as it claims treble damages from the primary defendants under the holding herein that the complaint charges acts cognizable under the primary jurisdiction of the Commission which are remediable under its reparation power . . ." (R. p. 618.)

REASONS FOR GRANTING THE WRIT

I.

The conflict in decision between the Interstate Commerce Commission and the District Court should be resolved by this Court.

In October, 1941, the Commission, in the light of the Transportation Act of 1940, reaffirmed its jurisdictional holdings made in 1935 and 1938 (pp. 8-10, *supra*) (*Hoboken Mfrs. Railroad Company* v. *Abilene and Southern Railway Company,* 248 I. C. C. 109, at pp. 109-110), and ordered those railroads (which included all of the primary defendants herein) according as they participate in through routes with petitioner, to permit interchange and use of their cars by petitioner, according as they participated in such through routes.[1]

Upon review of that order, in *United States* v. *Pennsylvania R. Co., supra,* the railroads contended that amendments to the Interstate Commerce Act by the Transportation Acts of 1920 and 1940 had taken away from the Commission *all power* over interchange and use of cars by a water carrier, even where a through route existed. It was with reference to this argument that this Court "interpreted" the National Transportation Policy in language which led the District Court in this case to overrule the Commission's decision, and hold that the Commission has the power to require all railroads to permit unretricted use and interchange with petitioner, a water carrier, of cars owned by railroads which do not participate in or maintain through routes with petitioner.

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[1] Certain of the secondary defendants, which had been parties to the original proceedings, had previously consented to use of their cars by Seatrain (R. p. 110).

This conflict in decision between the Commission and the District Court, each holding that it has no jurisdiction to grant relief to Seatrain in the matter of the interchange of cars belonging to railroads which do not participate in and maintain through routes with Seatrain, is one which this Court should resolve. The Commission's decision that it has a limited jurisdiction (*i.e.*, as to cars of participants in through routes) has already been subjected to Court review and has, indeed been upheld by this Court, in *United States* v. *Pennsylvania R. Co., supra.*

In order to comply with the District Court's suggestion in this case that it again resort to the Commission, petitioner has applied to the Commission for a declaratory order under Section 5 (d) of the Administrative Procedure Act, defining the extent and basis of the Commission's jurisdiction in the premises.[2] Petitioner hopes in this way to gain the benefit of a current expression by the Commission of its views as to the two questions here presented to the Court. But petitioner also recognizes that no decision by the Commission on these questions can finally settle these issues,—that only a decision by this Court can have that effect. Whatever declaratory order the Commission might make would not be binding on anyone who might choose to challenge it or challenge any action of the Commission taken in pursuance thereof.

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[2] A copy of this application as filed with the Commission is annexed hereto as Appendix B.

In view, moreover, of the fact that the District Court's opinion fails to indicate any section or sections of the Interstate Commerce Act as conferring jurisdiction upon the Commission, but instead relies upon the "spirit" of the National Transportation Policy, which Policy does not in itself grant any power to the Commission or impose any duties upon the railroads, petitioner sees little reason to expect that the Commission will depart from its former final holding, unless this Court itself, in resolving the conflict, directs it to do so.

In the meantime, the two conflicting decisions by the Commission and the District Court stand in the way of petitioner's obtaining, in either forum, the relief which it needs to enable it fully to make available to the public the special advantages inherent in its service (See *United States* v. *Pennsylvania R. Co., supra,* at p. 617).

To prevent such conflict and uncertainty, this Court has been given direct appellate jurisdiction to review cases under the Interstate Commerce Act, without their passing through the Courts of Appeal. (Jud. Code Secs. 1253, 1291). The same considerations apply, *mutatis mutandis,* to the decision of these questions as to the interpretation of the Interstate Commerce Act, in this antitrust case. And since the conflict, and resulting uncertainty, as to the application of the Interstate Commerce Act to petitioner's use and interchange of railroad-owned freight cars, were engendered by the District Court's interpretation of this Court's opinion in *United States* v. *Pennsylvania R. Co.,* *supra,* only this Court can, in the final analysis, resolve that conflict or remove that uncertainty.

Finally, the District Court's decision creates, but gives no help in resolving, the question as to the statutory basis in the Interstate Commerce Act of the power which it concluded that the Commission "must have." In the prior proceedings before it, the Commission was unable to find any provision of the Act conferring upon it such power.

This Court's opinion in *United States* v. *Pennsylvania R. Co., supra,* being confined to through routes, throws no light on this question. If it is the Commission rather than the Court which has the power to give petitioner the relief it is seeking, petitioner and the Commission alike are urgently in need of guidance as to the particular provisions of the Act under which that relief should be sought and granted.

This conflict in decision between the Commission and the Courts also raises squarely the important question whether the District Court was free to disregard the Commission's earlier decision, in proceedings between the same parties, as to the Commission's own lack of power.

The doctrine of primary jurisdiction requires initial resort to the administrative agency, to obtain relief which it has jurisdiction to give, in order to preserve that unity in the system of regulation which the Interstate Commerce Act was designed to achieve. *Texas & Pacific Ry. Co.* v. *Abilene Cotton Oil Co.,* 204 U. S. 426 (1907). When the Commission asserts jurisdiction, and either grants or denies relief, its decision is not subject to collateral attack, but can only be reviewed directly by the special procedures provided in the Judicial Code.

> *Interstate Commerce Act,* Section 17 (9);
> *Venner* v. *Michigan Central R. R. Co.,* 271 U. S. 127 (1926);
> *Terminal Warehouse Co.* v. *Pennsylvania R. Co.,* 297 U. S. 500 (1936).

This case presents the reverse question, which is of equal importance in the administration both of the Interstate Commerce Act and of the antitrust laws, whether a decision of the Commission denying its own jurisdiction is subject to collateral attack. It likewise presents the cognate question as to the effect of a decision by the Interstate Commerce Commission, and a Court decision upholding the same, as *res judicata,* in a subsequent action between the same parties under the antitrust laws. (cf. *Terminal Warehouse Co.* v. *Pennsylvania R. Co., supra.*)

II.

This case presents an important question as to the Commission's jurisdiction to award reparation under the Interstate Commerce Act which has not been but should be passed upon by this Court.

The complaint alleges a conspiracy among the defendants and other railroads to monopolize interstate trade and commerce in the transportation of freight and to restrain the competition, and limit and prevent the growth and development of petitioner Seatrain, a water carrier, as a competitor with railroads in such commerce, and if possible to drive it out of business (R. pp. 16-17).

Among the means alleged to have been used by defendants to carry out the conspiracy were those subsumed by the District Court under the term "unfair competitive practices."

The complaint charges, as such means, the concerted utilization of available administrative and court procedures, in bad faith or without probable cause, knowingly and recklessly misrepresenting facts therein, making misleading statements of fact therein, multiplying and protracting proceedings thereunder, in bad faith or without probable cause, not for the purpose of obtaining settlement of issues, but with the intended effect of continuing and creating doubts and uncertainties, all for the purpose and with the effect of preventing future diversion of all-rail traffic to Seatrain in furtherance of the conspiracy (R. pp. 31-33).

No provision of the Interstate Commerce Act prohibits or declares unlawful the use of such practices in proceedings before the Commission, to say nothing of proceedings before the courts.

The District Court held, however, with respect to petitioner's charges as to such practices (R. p. 618):

> "The subsidiary charges made by Seatrain as to unfair competitive practices upon the part of the defendants are incidental to the main allegations of the complaint that the defendants have conspired to deny to Seatrain interchange and use of freight cars owned by railroads. They must follow the major charge as being within the jurisdiction of the Commission.

> Neither can this court maintain jurisdiction over the suit in so far as it claims treble damages from the primary defendants under the holding herein that the complaint charges acts cognizable under the primary jurisdiction of the Commission which are remediable under its reparation power."

As alleged in the complaint, these charges as to "unfair competitive practices" are not "subsidiary" to, but coordinate with, the charges involving exclusion from car interchange; the "major charge", to which both are alike "subsidiary", is the charge that defendants have conspired to limit petitioner's growth and development and if possible to drive it out of business as a competitor of railroads in interstate commerce, by use of these means, among others.

Petitioner recognizes, of course, that it is not entitled to recover under the antitrust laws injuries remediable under the reparations power of the Commission. It does not seek any such damages in this case. It does seek, however, recovery of such damages as it can prove it has sustained that are not remediable under the reparations power of the Commission—a recovery which this Court, in *Terminal Warehouse Co.* v. *Pennsylvania R. Co., supra,* indicated it was entitled to have.

The District Court avoided this question by holding that all of petitioner's damages would be recoverable as reparations before the Commission (R. p. 618). This Court has already indicated, however, in *Terminal Warehouse Co.* v. *Pennsylvania R. Co., supra,* that the underlying conspiracy pursuant to which the acts were done, is not enough to bring within the Commission's jurisdiction (under Section 16, par. 1) to award damages for a violation of the Act, the damages caused by acts which are not prohibited or declared to be unlawful (see Section 8), or indeed even mentioned by any section of the Act.

III.

The Public Interest would be served by a Prompt Review.

This Court has cited with approval the finding of the Interstate Commerce Commission that Seatrain's "interstate operations were in the public interest and of advantage to the convenience and commerce of the public."[1]

By reason of the matters alleged and shown in this case, the respondents have injured and are now injuring not only Seatrain, but to a far greater extent the public, by depriving numerous industries and communities of the efficient and economical transportation which Seatrain could otherwise provide. The injury thus inflicted on the public by the unlawful combination and conspiracy exceeds in amount even the very substantial injury inflicted upon Seatrain as a servant of the public.

More than a year ago the Commission granted Seatrain authority to inaugurate its New York-Savannah service, saying (R. pp. 123-124, Annex C to aff., R. p. 185):

> "We find that there is an immediate and urgent need for applicant's proposed service . . . and that

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[1] *United States* v. *Pennsylvania R. Co.*, 323 U. S. 612, at p. 614.

> there is no carrier service capable of meeting such need."

In dismissing an action by the railroads brought to annul and set aside that order of the Commission, the District Court for the Eastern District of Virginia on January 9, 1952 (*Alabama Great Southern R. Co., et al.* v. *United States,* 103 F. Supp. 223; Annex D to aff., R. pp. 186-192) approved findings of the Commission underlying its grant of authority that the immediate and urgent need found by the Commission "was demonstrated by the port history, the port economy, and the port demands of the Savannah area"; that industries had chosen the Savannah area for their plants "because of the available coastal ship service", which had all been suspended in 1942 and none restored when the Commission's order was made. "Their anticipated expansion was predicated on this service. Commercial ties with manufacturers in the northeast United States, and competition with other ports along the Atlantic Ocean front, were not maintainable by shippers in the Southeast without water transportation at hand at Savannah" (103 F. Supp. at p. 225; Annex D to aff., R. p. 188).

The Virginia District Court also pointed to the fact that the Federal Maritime Board had urged the Commission to authorize the service on the ground that "It is necessary for the national defense and development of its foreign and domestic commerce that the United States shall have a merchant marine", and called attention to the 1,861,900 tons of commodities water-borne between Savannah and New York, in the period 1939-42 (103 F. Supp. at p. 226; Annex D to aff., R. p. 189).

Yet due to the conflict of decisions between the Commission and the District Court, each finding that it has no jurisdiction to give petitioner adequate (or any) relief as to car interchange, the parties to the conspiracy continue, and until such conflict has been resolved by this Court,[3] will continue, to frustrate this public interest.

Petitioner commenced service between New York and Savannah on November 30, 1951, immediately following the Commission's grant of temporary authority to furnish the public with a service which it found was urgently and immediately needed. For the past year, Seatrain has sought from the Federal Court "the privilege of carrying the very railroad cars which carry freight to its ports" (See *United States* v. *Pennsylvania R. Co., supra,* at p. 617), not owned by railroads which participate in and maintain through routes with Seatrain. Seatrain has been unable to render to the public the superior service of which it is capable because of the lack of this right. The service has been materially restricted and hampered by reason of Seatrain's inability to obtain that right. Relief from such restrictions is needed as urgently and immediately as the service itself is needed so that Seatrain can give the public the inherent advantages which cannot be given until it obtains the right to carry all cars.

The second question presented is so interrelated with the first that it, too, requires prompt determination. Accordingly, petitioner respectfully prays that this Court grant certiorari to review both of the questions presented, but not either one of them without the other.

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[3] Inasmuch as the conflict of decisions presented by this case arose out of the District Court's interpretation of an opinion of this Court upholding an order of the Commission which reflected contrary findings, it would hardly appear helpful to this Court to have a further interpretation by the Court of Appeals.

Respectfully submitted,

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Dated: December 10, 1952.

APPENDIX A

Statutes Involved

Sherman Antitrust Act, sec. 7.

> "Any person who shall be injured in his business or property by any other person or corporation by reason of anything forbidden or declared to be unlawful by this act, may sue therefor in any district court of the United States in the district in which the defendant resides or is found, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the costs of suit, including a reasonable attorney's fee."

Clayton Act, sec. 16.

> "That any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief, in any court of the United States having jurisdiction over the parties, against threatened loss or damage by a violation of the antitrust laws, including sections two, three, seven and eight of this Act, when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity, under the rules governing such proceedings, and upon the execution of proper bond against damages for an injunction improvidently granted and a showing that the danger of irreparable loss or damage is immediate, a preliminary injunction may issue: *Provided*, that nothing herein contained shall be construed to entitle any person, firm, corporation, or association, except the United States, to bring suit in equity for injunctive relief against any common carrier subject to the provisions

of the Act to regulate commerce, approved February fourth, eighteen hundred and eighty-seven, in respect of any matter subject to the regulation, supervision, or other jurisdiction of the Interstate Commerce Commission."

Interstate Commerce Act, sec. 8.

"That in case any common carrier subject to the provisions of this part shall do, cause to be done, or permit to be done any act, matter, or thing in this part prohibited or declared to be unlawful, or shall omit to do any act, matter, or thing in this part required to be done, such common carrier shall be liable to the person or persons injured thereby for the full amount of damages sustained in consequence of any such violation of the provisions of this part, together with a reasonable counsel or attorney's fee, to be fixed by the court in every case of recovery, which attorney's fee shall be taxed and collected as part of the costs in the case."

Interstate Commerce Act, sec. 16(1).

"That if, after hearing on a complaint made as provided in section 13 of this part, the commission shall determine that any party complainant is entitled to an award of damages under the provisions of this part for a violation thereof, the commission shall make an order directing the carrier to pay to the complainant the sum to which he is entitled on or before a day named."

Interstate Commerce Act, sec. 1(4).

"It shall be the duty of every common carrier subject to this part to provide and furnish transportation upon reasonable request therefor, and to establish reasonable through routes with other such carriers, and just and reasonable rates, fares, charges, and classifications applicable thereto; and it shall be the duty of common carriers by railroad subject to this part to establish reasonable through routes with common carriers by water subject to part III, and just and reasonable rates, fares, charges, and classifications applicable thereto. It shall be the duty of every such common carrier establishing through routes to provide reasonable facilities for operating such routes and to make reasonable rules and regulations with respect to their operation, and providing for reasonable compensation to those entitled thereto; and in case of joint rates, fares, or charges, to establish just, reasonable, and equitable divisions thereof, which shall not unduly prefer or prejudice any of such participating carriers.''

Interstate Commerce Act, sec. 1(10).

''The term 'car service' in this part shall include the use, control, supply, movement, distribution, exchange, interchange, and return of locomotives, cars, and other vehicles used in the transportation of property, including special types of equipment, and the supply of trains, by any carrier by railroad subject to this part.''

Interstate Commerce Act, sec. 1(13).

''The Commission is hereby authorized by general or special orders to require all carriers by railroad subject to this part, or any of them, to file with it from time to time their rules and regulations with respect to car service, and the Commission may, in its discretion, direct that such rules and regulations shall be incorporated in their schedules showing rates, fares, and charges for transportation, and be subject to any or all of the provisions of this part relating thereto."

Interstate Commerce Act, sec. 1(14)(a).

"The Commission may, after hearing, on a complaint or upon its own initiative without complaint, establish reasonable rules, regulations, and practices with respect to car service by common carriers by railroad subject to this part, including the compensation to be paid and other terms of any contract, agreement, or arrangement for the use of any locomotive, car, or other vehicle not owned by the carrier using it (and whether or not owned by another carrier), and the penalties or other sanctions for nonobservance of such rules, regulations, or practices."

Interstate Commerce Act, sec. 3(4).

"All carriers subject to the provisions of this part shall, according to their respective powers, afford all reasonable, proper, and equal facilities for the interchange of traffic between their respective lines and connecting lines, and for the receiving, forwarding, and delivering of passengers or property to and from connecting lines; and shall not discriminate in their rates, fares, and charges between connecting lines, or unduly prejudice any connecting line in the distribution of traffic that is not specifically routed by the shipper. As used in this paragraph the term 'connecting line' means the connecting line of any carrier subject to the provisions of this part or any common carrier by water subject to part III."

Appendix A

Interstate Commerce Act, sec. 7.

> "[*As amended August 9, 1935*] [49 U. S. C., §7.] That it shall be unlawful for any common carrier subject to the provisions of this part to enter into any combination, contract, or agreement, expressed or implied, to prevent, by change of time schedule, carriage in different cars, or by other means or devices, the carriage of freights from being continuous from the place of shipment to the place of destination; and no break of bulk, stoppage, or interruption made by such common carrier shall prevent the carriage of freights from being and being treated as one continuous carriage from the place of shipment to the place of destination, unless such break, stoppage, or interruption was made in good faith for some necessary purpose, and without any intent to avoid or unnecessarily interrupt such continuous carriage or to evade any of the provisions of this part."

Interstate Commerce Act, sec. 15(3).

> "The Commission may, and it shall whenever deemed by it to be necessary or desirable in the public interest, after full hearing upon complaint or upon its own initiative without complaint, establish through routes, joint classifications, and joint rates, fares, or charges, applicable to the transportation of passengers or property by carriers subject to this part, or by carriers by railroad subject to this part and common carriers by water subject to part III, or the maxima or minima, or maxima and minima, to be charged, and the divisions of such rates, fares, or charges as hereinafter provided, and the terms and conditions under which such through routes shall be operated. The Commission shall not, how-

ever, establish any through route, classification, or practice, or any rate, fare, or charge, between street electric passenger railways not engaged in the general business of transporting freight in addition to their passenger and express business, and railroads of a different character. If any tariff or schedule canceling any through route or joint rate, fare, charge, or classification, without the consent of all carriers parties thereto or authorization by the Commission, is suspended by the Commission for investigation, the burden of proof shall be upon the carrier or carriers proposing such cancelation to show that it is consistent with the public interest, without regard to the provisions of paragraph (4) of this section.''

Interstate Commerce Act, sec. 305(b).

''It shall be the duty of common carriers by water to establish reasonable through routes with other such carriers and with common carriers by railroad, for the transportation of persons or property, and just and reasonable rates, fares, charges, and classifications applicable thereto, and to provide reasonable facilities for operating such through routes, and to make reasonable rules and regulations with respect to their operation and providing for reasonable compensation to those entitled thereto. Common carriers by water may establish reasonable through routes and rates, fares, charges, and classifications applicable thereto with common carriers by motor vehicle. In the case of joint rates, fares, or charges it shall be the duty of the carriers parties thereto to establish just, reasonable, and equitable divisions thereof, which shall not unduly prefer or prejudice any of such carriers.''

Appendix A

National Transportation Policy.

"It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act, so administered as to recognize and preserve the inherent advantages of each; to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices; to cooperate with the several States and the duly authorized officials thereof; and to encourage fair wages and equitable working conditions;—all to the end of developing, coordinating, and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense. All of the provisions of this Act shall be administered and enforced with a view to carrying out the above declaration of policy."

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No. 497

IN THE

Supreme Court of the United States

OCTOBER TERM, 1952

SEATRAIN LINES, INC., *Petitioner,*

v.

PENNSYLVANIA RAILROAD COMPANY, ATLANTIC COAST LINE RAILROAD COMPANY, LOUISVILLE & NASHVILLE RAILROAD COMPANY, SOUTHERN RAILWAY COMPANY, BALTIMORE AND OHIO RAILROAD COMPANY, SEABOARD AIR LINE RAILROAD COMPANY, ERIE RAILROAD COMPANY, and ASSOCIATION OF AMERICAN RAILROADS, *Respondents.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF IN OPPOSITION FOR THE RESPONDENTS PENNSYLVANIA RAILROAD COMPANY, ATLANTIC COAST LINE RAILROAD COMPANY, SOUTHERN RAILWAY COMPANY, BALTIMORE AND OHIO RAILROAD COMPANY, SEABOARD AIR LINE RAILROAD COMPANY, ERIE RAILROAD COMPANY, AND ASSOCIATION OF AMERICAN RAILROADS

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OPINION BELOW

The opinion of the United States District Court for the District of New Jersey (R. 593-622, 624-625) is reported at 108 F. Supp. 113. Petitioner's appeal was docketed in the United States Court of Appeals for the Third Circuit on November 25, 1952, and has not been heard or decided by that court.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. 1254.

QUESTION PRESENTED

Whether the United States District Court for the District of New Jersey erred in holding that petitioner's suit for private relief under the Sherman and Clayton Acts should be dismissed because the Interstate Commerce Commission has primary jurisdiction of the subject matter of the alleged cause of action.

STATUTES INVOLVED

The relevant provisions of the antitrust laws and of the Interstate Commerce Act are set forth in Appendix A to the petition.

STATEMENT

In December, 1951, petitioner brought suit in the United States District Court for the District of New Jersey seeking treble damages under the antitrust laws against four of the respondents here[1] and injunctive relief against them, as well as against the other respondents, four other railroads, and six other railroad associations and committees. The respondents, other than the Louisville & Nashville Railroad Company, on April 2, 1952, filed motions to dismiss the amended complaint on the grounds that the matters complained of fell within the exclusive or primary jurisdiction of the Interstate Commerce Commission, that the suit was barred by Section 16 of the Clayton Act, and that the complaint failed to state a claim upon which relief could be granted (R. 441-442). Respondent Louisville & Nashville Railroad Company moved to dismiss the complaint on the grounds of invalidity of service and that the venue was improperly laid. Other defendants below either answered or moved to dismiss upon various grounds.[2]

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[1] These are the Pennsylvania Railroad Company, Atlantic Coast Line Railroad Company, Southern Railway Company and the Louisville & Nashville Railroad Company.

Petitioner moved for a preliminary injunction to restrain the allegedly illegal exclusion of the petitioner from the benefits of certain arrangements among the railroads concerning the use and interchange of freight cars that are provided by what are known generally as the Car Service and Per Diem Rules (R. 57-60). Petitioner's and respondents' motions were argued on April 14, 1952.[3]

The district court, in reliance on *Far East Conference* v. *United States,* 342 U.S. 570, 576-577, and other decisions of this Court, held that the matters complained of were within the primary jurisdiction of the Interstate Commerce Commission or were subsidiary matters incidental to the principal allegations of the complaint and therefore insufficient to confer jurisdiction upon the court (R. 615, 618, 621-622). The district court accordingly denied petitioner's motion for a preliminary injunction and dismissed the complaint (R. 623, 625-626).

Notice of appeal was filed on November 21, 1952 and the appeal was docketed in the Court of Appeals for the Third Circuit on November 25, 1952.

A discussion of the issues raised by respondents' motions to dismiss the amended complaint requires brief comment on the origin and nature of the controversy between Seatrain and the railroads.

Seatrain began coastwise operations on October 6, 1932. It offered a novel type of transportation service: water carriage of loaded freight cars, swung by a crane from railroad tracks onto the tracks in the Seatrain vessel, and similarly unloaded at destination. There have been difficult problems in adjusting the relationships between this rail carrier by water and the railroads. In the past twenty years there have been eighteen Commission proceedings involving these relationships, of which six are still pending. The Commission's reports contain fifteen opinions dealing with these proceedings. Four of the Commission's orders have been reviewed in the courts, three reaching this Court. The separate proceedings are tabulated in note 3 of the opinion below (R. 608-609).

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[2] Voluntary dismissals have been entered with respect to ten defendants below who are not made respondents here (R. 45, 633).

[3] Hearing on the motion of the Louisville & Nashville Railroad was deferred (R. 602).

The basic question running through all these proceedings is whether the Commission should deal with Seatrain as though it were a break-bulk water carrier or as though it were a rail carrier.[4] It is in fact neither, but instead a rail carrier by water. One of the important issues involved in these proceedings was whether Seatrain, which owns no freight cars, should be permitted unrestricted use of the freight cars of the railroads in the conduct of its business and, if so, upon what terms and conditions.[5] From the previous litigation there has not emerged a definitive solution of the controversy. Each side has within the past year taken steps to seek that definitive solution.

Seatrain, by its complaint below, sought to remove the whole controversy—a complex series of technical issues in transportation economics and commerce law—from the Interstate Commerce Commission to the district court and to have it dealt with under the antitrust laws rather than the Interstate Commerce Act. As to matters in which it had previously obtained relief from the Commission, petitioner asked the district court to expand and to amend that relief and to add the sanctions of contempt. As to matters in which the Commission had denied relief, petitioner asked the court by injunction to give the very relief the Commission had refused. It asked, in cases where the Commission clearly has reparation jurisdiction, and even in cases where the Commission had exercised that jurisdiction by denying Seatrain's claims for reparation, that the court award it treble damages under the antitrust laws. It asked that the court decide issues under the Interstate Commerce Act which have never been submitted to the Commission, but which lie within its jurisdiction.

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[4] In *Seatrain Lines, Inc.* v. *Akron C. & Y. Ry. Co.*, 226 I.C.C. 7, 12 (1938), the Commission said, by way of definition of a break-bulk water carrier: "So designated because rail-and-water shipments moving in connection therewith break bulk by being transferred between railroad cars and the vessels at the ports."

[5] Specifically, the railroads have opposed giving Seatrain a status which would permit it (a) to compete for rail traffic with the commanding inducement of much lower rates for like service, based upon the Commission's equating Seatrain's position to that of a break-bulk carrier rather than the all-rail service; (b) to avoid per diem rental on freight cars waiting loading aboard Seatrain vessels by analogy to break-bulk carriers, in contrast to the normal obligations of the railroads themselves; (c) to obtain the unrestricted use of railroad-owned freight cars without obligation to bear the real risks and costs of ownership ordinarily borne by railroads or to meet the normal railroad burden of moving empty cars.

Following the filing by respondents of their motions to dismiss, petitioner withdrew all of its prayers for relief except those directed against (1) the alleged concerted exclusion of Seatrain from the benefit of the railroads' joint arrangements for the use and interchange of freight cars and (2) the alleged concerted use by respondents of certain unfair competitive practices, specifically the alleged abuse of administrative and court procedures for the purpose of injuring petitioner's business.

The respondent railroads believed that the controversy between Seatrain and the railroads should receive a definitive and speedy determination by the agency vested with statutory authority to determine the basic issues involved. They, accordingly, filed, on March 26, 1952, a complaint with the Interstate Commerce Commission asking for a comprehensive examination and decision of the many issues between Seatrain and the railroads. After repeated extensions of time to plead, granted at petitioner's request, petitioner, on December 10, 1952, filed an answer to this complaint. The basic question which the petitioner now asks this Court to consider is, therefore, together with others, now at issue before the Interstate Commerce Commission.

Finally, petitioner itself on December 10, 1952, filed with the Interstate Commerce Commission an elaborate petition for a declaratory ruling as to its jurisdiction over this controversy (App. B to Petition).

ARGUMENT

The question sought to be raised by the petition does not require or deserve review by this Court; the decision of the district court is clearly correct. See *Far East Conference* v. *United States*, 342 U. S. 570, and *S. S. W.* v. *Air Transport Association of America, et al.*, 191 F. 2d 658 (App. D. C. 1951), cert. denied 343 U. S. 955. In any event, the petition fails to make any showing that justifies review by this Court at this time. This is essentially a private controversy; it raises no issue of great constitutional significance or of extraordinary national importance that requires immediate consideration by this Court. It is not to be classed with those cases where, because of urgent public need for prompt settlement of the issues involved, this Court has been willing to forego the benefits of careful review by the Court of Appeals. Cf. *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U. S. 579, 584; *United States* v. *United Mine Workers*, 330 U. S. 258, 283, 289; *Ex parte Quirin*, 317 U. S. 1, 19-20; *Carter* v. *Carter Coal Co.*, 298 U. S. 238; *Railroad Retirement Board* v. *Alton R. Co.*, 295 U. S. 330, 333-334; *Norman* v. *B. & O. R. Co.*, 294 U. S. 240, 243, 295.[6] "The power which Congress has given to this Court to short-circuit the Courts of Appeals should not be exercised except for some compelling reason of wise judicial administration,'' Frankfurter, J., concurring in part and dissenting in part in *Stainback* v. *Mo Hock Ke Lok Po,* 336 U. S. 368, 384.

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[6] There is no contention that issues, similar to those here, are presented in cases already pending before this Court, a circumstance that has, upon occasion, led to the employment of this extraordinary procedure. *White* v. *Mechanics Securities Corp.*, 269 U. S. 283, 299; *Johnson* v. *Fleet Corporation*, 280 U. S. 320, 324-325; *Rickert Rice Mills, Inc.* v. *Fontenot*, 297 U. S. 110; *Graham & Foster* v. *Goodcell*, 282 U. S. 409, 411-412, 415, n. 2; *Porter* v. *Dicken*, 328 U. S. 252, 254; cf. *Stainback* v. *Mo Hock Ke Lok Po*, 336 U. S. 368, 370-371.

1. Petitioner attempts to support its effort to by-pass the Court of Appeals on the ground that its service from New York to Savannah, which has recently been instituted, has been ''materially restricted and hampered'' by reason of respondents' activities.[7] The facts do not support this contention. The same contention was made in the district court in support of the petitioner's motion for preliminary injunction, but there was a failure of proof.[8] This contention was not sustained by the district court. In any event, the need for interlocutory relief, even if it had been shown to exist, would not be a basis for immediate review by this Court. That would be a matter for the district court and the court of appeals.

2. Petitioner asserts that there is a conflict between the district court and the Commission over the question of the Commission's authority to order car interchange. Petitioner contends that the Commission has held that it can order car interchange only by those railroads which do or may participate in through routes with petitioner, and that

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[7] Petitioner points out that the Interstate Commerce Commission in authorizing this service on a temporary basis found that there was an ''immediate and urgent'' public need for the service. What may be ''immediate and urgent'' for the purposes of a temporary authorization by the Interstate Commerce Commission to operate the transportation service is unrelated to the exercise by this Court of its power of extraordinary review. The New York-Savannah service is in operation under temporary authority from the Commission, and the continuation of that service is in no way dependent upon the final disposition of this suit.

[8] The respondents presented proof, which was undisputed, that railroads owning approximately 50% of the boxcars owned by Class I railroads had consented to the use of their cars in petitioner's New York-Savannah service, and that the five non-consenting railroads against whom the preliminary injunction was sought owned only 18% of the total number of boxcars owned by all Class I railroads (R. 460).

the district court, on the other hand, held that the Commission had plenary authority to order car interchange. Admittedly, the Commission, prior to the decision of this Court in *United States* v. *Pennsylvania R. Co.*, 323 U. S. 612, expressed the view that it could order car interchange only where through routes existed or as an incident to its power to prescribe through routes. Petitioner, however, points to nothing indicating that since that decision of this Court the Commission retains this restricted view of its authority. It should not be assumed that the Commission will ignore the broad holding of this Court's decision or that it will decline to exercise the jurisdiction necessary to decide the complex controversy between Seatrain and the railroads.

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Furthermore, the issue sought to be raised by the petitioner is not, in fact, raised by petitioner's suit under the Sherman Act. All of the railroads named as defendants in that proceeding and against which relief is sought are railroads that are admittedly in a position to be parties to through routes with Seatrain. Even on a restricted view of the Commission's authority, the relief which Seatrain seeks against respondent railroads in the antitrust proceeding is the same relief which the Commission has the power to grant.

However this may be, the asserted conflict between the Interstate Commerce Commission and the district court does not justify immediate review by this Court. If Judge Forman's careful opinion be mistaken, the court of appeals can correct his error. Nor, indeed, is any reason given why petitioner should rush to this Court prior to the Commission's own re-examination of the issue; that re-examination is involved in respondent railroads' complaint filed with the Commission in March, 1952, and is sought to be raised, also, by petitioner's own petition to the Commission in December, 1952, for a declaratory ruling.

3. The second ground of the petition is that the district court held that the Commission had authority to award

reparation for unfair competitive practices in abuse of administrative and court proceedings. But respondents did not urge and the district court did not hold that the Commission had any such authority.[9] We urged, and the court held (R. 618) that these were incidental or subsidiary complaints, insufficient in themselves to warrant a retention of jurisdiction.[10] This holding is correct.

In *U. S. Nav. Co.* v. *Cunard S. S. Co.,* 284 U. S. 474, 480-485, the complaint similarly included a number of subsidiary allegations as to unfair competitive practices, strikingly like those alleged by Seatrain. The Court held them so interrelated with the main charges of violation of the Shipping Act "as to be in effect a component part of them," and accordingly dismissed the complaint. See also *Terminal Warehouse* v. *Penn. R. R.,* 297 U. S. 500, 513. Thus, so long as the Interstate Commerce Commission has jurisdiction over ". . . the dominant facts alleged in the present case as constituting a violation of the Antitrust Act" (*Cunard* case, 284 U. S. at 483), its jurisdiction cannot be defeated by appending to the complaint corollary and minor allegations of misconduct over which the Commission has no jurisdiction.

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[9] We did suggest that by a principle cognate to that of primary jurisdiction, the district court might well seek the advice of the Interstate Commerce Commission on the question whether its processes had been abused, or whether the litigation before it was unnecessarily delayed or vexatiously carried out. This is far from a contention that the Commission had power to award reparation on the basis of that kind of alleged competitive practices.

[10] The district court concluded that the subsidiary issues "must follow the major charge as being within the jurisdiction of the Commission." But it cannot be thought that the district court would casually innovate a doctrine that the Commission had an associative jurisdiction which extended its statutory jurisdiction to all allied or subsidiary complaints. What the district court in fact held was that the charges of unfair competition were so clearly dependent upon the main allegations relating to car interchange, etc., that it would not carve up the complaint to separate these minor and incidental allegations in order to create an independent cause of action; these, therefore, followed the major charges.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the petition for a writ of certiorari should be denied.

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Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

MEMORANDUM ON BEHALF OF RESPONDENT, LOUISVILLE & NASHVILLE RAILROAD COMPANY.

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IN THE

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No. 497.

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v.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

MEMORANDUM ON BEHALF OF RESPONDENT, LOUISVILLE & NASHVILLE RAILROAD COMPANY.

Petitioner, Seatrain Lines, Inc., brought suit in December of 1951 in the United States District Court for the District of New Jersey under the antitrust laws against four railroads, including the Louisville & Nashville Railroad Company (described as "primary defendants") for damages and for injunctive relief and against others for damages only.

On February 16, 1952, Louisville & Nashville Railroad Company entered its appearance specially and moved to dismiss the complaint and to quash the alleged service of a summons upon it on the grounds that the District Court had no jurisdiction over its person and that the venue of the action was improperly laid in New Jersey (Original Doc. No. 48). Thereafter, the other defendants, by motion, challenged the District Court's jurisdiction over the subject matter of the suit on the grounds that the Interstate Commerce Commission was the proper tribunal to which Seatrain Lines, Inc. should apply for the relief claimed (R. 441-442).

Argument on Louisville & Nashville Railroad Company's motion was held in abeyance by the District Court on the stated grounds that if the motions of the other defendants were granted, the Court would be required to dismiss as to the Louisville & Nashville Railroad Company as well, thus obviating the necessity for a hearing on the separate issues of venue and personal jurisdiction (R. 602).

The other defendants were successful on their motion addressed to jurisdiction over the subject matter, and the District Court dismissed the complaint as to them by order dated November 12, 1952 (R. 623). Although Louisville & Nashville Railroad Company had made no motion on the ground of lack of primary jurisdiction, had filed no briefs, and had made no arguments thereon, the District Court dismissed the complaint as to that company on the Court's own motion pursuant to Rule 12(h) of the Rules of Practice for the District Courts of the United States (R. 625). This order of dismissal was entered on November 21, 1952. Petitioner, Seatrain Lines, Inc., appealed to the Circuit Court of Appeals for the Third Circuit from both orders of dismissal and now petitions this Court under 28 U. S. C.

1254 for a writ of certiorari to that Court. Since Louisville & Nashville Railroad Company is brought before this Court as a result of that petition, it conceives it is obliged to make a statement of its position.

This Respondent contended from the outset that the District Court had no jurisdiction over its person and that venue was improperly laid. Those questions were raised by timely motion returnable prior to the motions of the other defendants. It conceived then, and it contends now, that it is not obliged to contest with Seatrain Lines, Inc. the question of primary jurisdiction or the merits of the case until the issue of personal jurisdiction and venue are first determined. Accordingly, Louisville & Nashville Railroad Company filed no briefs nor did it participate in any way in the argument relating to the primary jurisdiction issues. Although this Respondent agrees entirely and fully with the position taken by the other respondents who now oppose this application for a writ of certiorari, as argued and expressed in their joint brief filed herein, and accepts as correct the conclusions and orders of the District Court Judge, it likewise believes that it is not appropriate for it now, on this petition, to submit briefs or argument to this Court on those issues.

Conclusion.

It is respectfully submitted that a denial of the petition of Seatrain Lines, Inc. for a writ of certiorari, if adjudged with respect to the other defendants, should properly carry with it a denial of the petition with respect to Louisville & Nashville Railroad Company as well.

Robert Carey,
H. T. Lively,
Attorneys for Louisville & Nashville
Railroad Company.

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FILED
MAR 5 1953
HAROLD B. WILLEY, Clerk

IN THE

Supreme Court of the United States

October Term, 1952

No. 497

SEATRAIN LINES, INC.,
Petitioner,
vs.

PENNSYLVANIA RAILROAD COMPANY, ATLANTIC COAST LINE RAILROAD COMPANY, LOUISVILLE & NASHVILLE RAILROAD COMPANY, SOUTHERN RAILWAY COMPANY, BALTIMORE AND OHIO RAILROAD COMPANY, SEABOARD AIR LINE RAILROAD COMPANY, ERIE RAILROAD COMPANY, ASSOCIATION OF AMERICAN RAILROADS,
Respondents.

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

CARL E. NEWTON,
THEODORE S. HOPE, JR.,
Attorneys for Petitioner,
Seatrain Lines, Inc.

IN THE

Supreme Court of the United States

October Term, 1952

No. 497

Seatrain Lines, Inc.,

Petitioner,

vs.

Pennsylvania Railroad Company, Atlantic Coast Line Railroad Company, Louisville & Nashville Railroad Company, Southern Railway Company, Baltimore and Ohio Railroad Company, Seaboard Air Line Railroad Company, Erie Railroad Company, Association of American Railroads,

Respondents.

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

I. As to the Public Interest

In their brief in opposition to the petition respondents urge, first, that the present case does not involve the public interest, referring to it as "essentially a private controversy" (Resp. Br., p. 6). That the public interest is involved, because of the immediate and urgent public need which has been found to exist for petitioner's Savannah service, is, we believe, so clearly demonstrated in the brief in support of the application for certiorari, as to call for no further demonstration here.

Beyond this, however, respondents urge that petitioner's contention that their activities did materially restrict and hamper petitioner's service, instituted to meet that need, is not supported by the facts; indeed, they suggest that petitioner's application in the District Court for preliminary injunction (which involved the same contention) was denied for "failure of proof" (Resp. Br., p. 7). The decision below did not, however, go on any such ground. The District Judge denied the application for preliminary injunction, as he dismissed the case as a whole, solely upon jurisdictional grounds.

In this same context respondents suggest that the application for certiorari embodies an attempt on petitioner's part to obtain interlocutory relief from this Court and intimates that such relief might more appropriately be sought from the District Court or from the Court of Appeals (Resp. Br., p. 7). On the contrary, petitioner seeks by this application to have the jurisdictional issue created by the District Court's decision promptly resolved, because until it has been resolved petitioner will have no tribunal to which it can turn for any effective relief, either interlocutory or final. The District Court did not deny interlocutory relief because it felt that it was not shown to be necessary to prevent grave and irreparable harm to petitioner. It denied that relief solely upon the ground that it lacked power to give it in the present case.

Petitioner is not asking this Court for either interlocutory or final injunction against any of respondents' acts. It seeks (in its Question Number 1) only a decision of the question whether the District Court has power to enter such an injunction.

2. As to Question Number 1

Respondents suggest that the District Court's decision as to the Commission's jurisdiction over car interchange is not really inconsistent with the prior decisions of the Commission on this issue and intimate, without expressly stating, that the Commission's prior decisions, that its jurisdiction to require car interchange with a water carrier was limited to cars owned by railroads which participate in or maintain through routes with such water-carrier, were perhaps only *dicta* (Resp. Br., p. 8).

The fact is that such holdings by the Commission were not mere *dicta.* For more than nine years, petitioner sought relief from the Commission against these respondent railroads and others with respect to car interchange, not limited to cars owned by railroads which participate in or maintain through routes with petitioner, but predicated upon interchange of all railroad owned cars. The Commission denied relief with respect to all cars owned by railroads which do not participate in or maintain through routes with petitioner on the ground that its jurisdiction was limited to cars owned by railroads which participate in or maintain through routes with petitioner, and its order was reviewed and upheld in the courts.

In view of this situation, we are unable to understand how respondents can say to this Court, as they do on page 5 of their brief, that petitioner asked the District Court to decide issues under the Interstate Commerce Act which had never been submitted to the Commission, or can complain that petitioner is seeking from the District Court relief which the Commission had denied, when the Commission's denial was solely upon the ground that the Interstate Commerce Act did not give it jurisdiction of the subject matter.

Respondents also urge that the issues sought to be raised by petitioner are not in fact raised by petitioner's suit under the Sherman Act, pointing to the fact that all of the respondent railroads are or could be made parties to through routes with Seatrain and, therefore, are subject to Commission jurisdiction as regards the interchange of their cars (Resp. Br., p. 8).

Respondents carefully omit mention of the respondent Association in this connection, however. The Association, not being a carrier, is not, and could not conceivably be made a party to any through route with petitioner. The contention thus evidences a complete misconception of the reasons why this suit was brought against these respondent railroads and this respondent Association. The complaint alleges that respondent railroads have originated and maintained a conspiracy to prevent Seatrain's development and growth as their competitor in interstate commerce; that in aid of this conspiracy they have, through their instrumentality the respondent Association, brought about and maintained in effect the concerted exclusion of petitioner from unrestricted access to the cars of *all* railroads, including many which are not, and could not possibly be made, parties to through routes with Seatrain.

Thus, it is not correct to state, as respondents do, that the relief which Seatrain seeks against respondent railroads in this case is the same relief which the Commission has held it has power to grant.

Respondents' reliance upon this Court's decision in *Far East Conference* v. *U. S.*, 342 U. S. 570, and on the decision of the Court of Appeals in *S. S. W., Inc.* v. *Air Transport Association of America*, 191 F. 2d 658 (Resp. Br., p. 6), assumes that the District Court's decision as to the Commission's jurisdiction is correct. It also assumes (although the point was not involved in either of the above cases) that the District Court was free to disregard the repeated decisions of the Commission as to its own jurisdiction, in proceedings to which these respondents and petitioner were parties, and that respondents were free to open up again in this anti-trust case this issue which the Commission had decided.

The first question presented in the petition for certiorari is thus squarely presented in the case at bar, and has not previously been decided by this Court.

3. As to Question Number 2

With respect to the question of damages, respondents suggest (Resp. Br., p. 9) that the District Court in effect held (on the basis of the complaint alone) that petitioner had suffered no injury other than that which resulted directly and immediately from the individual acts of individual railroads respecting car interchange, as to which the Court held the Commission had plenary jurisdiction. The complaint does not so limit petitioner's claim for damages.

To be sure, the District Court had before it in support of petitioner's application for preliminary injunction much proof as to the injury currently being suffered by petitioner as a result of respondents' acts in excluding it from the interchange and use of cars—to which acts the prayer for injunction was limited. But this did not justify the assumption that no other proof as to damages not directed to the limited objective of the injunctive relief sought, could or would be offered upon a trial of the case. Yet, unless the District Court made precisely this assumption, and thus, in effect, prejudged the case, it is impossible to avoid the conclusion that, in the apt phrase of respondents, the District Court did "innovate a doctrine that the Commission had an associative jurisdiction which extended its statutory jurisdiction to all allied and subsidiary complaints'' (Resp. Br., p. 9, f. n. 10).

There is nothing in either *U. S. Nav. Co.* v. *Cunard S. S. Co.,* 284 U. S. 474, or in *Terminal Warehouse* v. *Penn. R. R. Co.,* 297 U. S. 500, which in any way militates against this conclusion The former of these cases sought only equitable relief against unfair competitive practice. No damages were, or could be, sought in view of the separation between law and equity then still subsisting. The latter case was decided after trial upon the basis of a record which contained no proof of damages not directly and immediately resulting from violations of the Interstate Commerce Act. We are aware of no case other than the present one in which a complaint seeking damages for injury to the plaintiff's business resulting from a conspiracy to monopolize interstate commerce carried out in part by means violative of the Interstate Commerce Act* and in part by other means, has been dismissed upon the complaint alone and without the reception of evidence, on the ground on which the District Court relied.

The second question presented in the petition for certiorari is likewise thus squarely presented in the case at bar, and has not previously been decided by this Court.

4. As to Proceedings pending before the Commission

As respondents point out (Resp. Br., p. 6), and as petitioner itself brought to the attention of the Court, there is now pending before the Interstate Commerce Commission a proceeding for declaratory order filed by petitioner in which the Commission is asked to define its own jurisdiction. There is also pending before the Commission the complaint filed by certain of the respondent railroads in March 1952. Petitioner Seatrain appended to its petition for certiorari herein its petition for a declaratory order. That petition for declaratory order, moreover, includes as an exhibit the aforesaid complaint filed in March 1952 by certain of the respondents and points out what is really involved therein. Without entering upon an analysis of these interstate commerce proceedings, which involve matters of some complexity, we respectfully refer the Court to said Appendix B to the petition for certiorari, and to respondent Railroads' brief, to respondent Association's brief, and to petitioner's reply brief in said proceedings for declaratory order, which for the sake of completeness, are annexed hereto as Appendices C, D and E, respectively.

---

* Seatrain is not seeking in this anti-trust proceeding damages for violations of the Interstate Commerce Act.

We respectfully submit that comparison of the various and conflicting positions taken by respondents in these proceedings and before this Court (as shown in detail in Appendix E, especially Section II, Subd. A and Section III, Subd. D) as to the extent of the Commission's jurisdiction, and the effect of this Court's holding in *U. S.* v. *Pennsylvania R. Co.*, 323 U. S. 612 in that regard, cogently demonstrates the need of the authoritative resolution of that question which only this Court can give.

Respectfully submitted,

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No. 49

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APPENDIX B

(1st of 2 Volumes)

BEFORE THE

Interstate Commerce Commission

DOCKET NO. 31177

PETITION OF SEATRAIN LINES, INC. FOR THE ISSUANCE OF DECLARATORY ORDERS UNDER SECTION 5(d) OF ADMINISTRATIVE PROCEDURE ACT

Volume 1 of 2 Volumes

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December 10, 1952

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  (A) The complaint is not in fact a complaint upon which the Commission could proceed either now or in the foreseeable future to find "the definitive and over-all solution of

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these many interrelated problems" which are raised in the complaint, or of the many other outstanding issues which are omitted therefrom 28

(B) The prayers for relief with respect to matters pertaining to the use of cars are predicated on the Commission's having only limited authority with respect thereof and not on the basis of the unlimited authority which the complainants and the defendant Association asserted the Commission had in the anti-trust proceeding. Either the Commission or the Court has jurisdiction over cars belonging to railroads which do not have through routes with Seatrain. The prayers in the complaint relating to car service matters are, therefore, not relevant to the solution of the issues with respect to use of cars other than those owned by railroads participating in through routes with Seatrain 34

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BEFORE THE

Interstate Commerce Commission

Docket No. ....

PETITION OF SEATRAIN LINES, INC. FOR THE ISSUANCE OF DECLARATORY ORDERS UNDER SECTION 5(d) OF ADMINISTRATIVE PROCEDURE ACT

Volume 1 of 2 Volumes

Comes now Seatrain Lines, Inc., hereinafter referred to as Seatrain, and respectfully prays that the Commission, under and pursuant to Section 5(d) of the Administrative Procedure Act, issue declaratory orders to the extent and in the particulars hereinafter prayed.

Statutory Authority for the Relief Sought

Section 5(d) of the Administrative Procedure Act authorizes the Interstate Commerce Commission to issue declaratory orders to terminate controversies or remove uncertainties. It reads as follows:

> "Declaratory Orders.—The agency is authorized in its discretion, with like effect as in the case of other orders, to issue a declaratory order to terminate a controversy or remove uncertainty."

Events Precipitating the Request for the Relief Sought Herein

The Interstate Commerce Commission is here asked to invoke its power to issue declaratory orders to remove uncertainties which have arisen as a result of a recent decision of the United States District Court for the District of New Jersey, copy of which, written by Chief Judge Forman, is attached hereto and made a part hereof as Exhibit A.

Relief Sought by Seatrain from Federal Court

In said proceedings Seatrain sought from the Federal Court treble damages under the antitrust statutes for the losses in earnings which it had suffered over a period of years as a result of a combination and conspiracy between, and concerted action of, several powerful railroads (together with other railroads), to restrain the competition of Seatrain as a competitor with railroads in interstate commerce by limiting its growth and development as a competitor and, if possible, driving it out of business.

The complaint showed that such damages resulted from doubts and uncertainties as to the continuing availability of Seatrain's services and the advantages inherent therein, by reason of the fact that shippers and receivers of freight who contemplate the utilization of a water carrier service such as that operated by Seatrain, with its inherent advantages, must plan the opening of new markets, the cost and other specifications of their products with relation to intended markets, the establishment of facilities and other related matters, in advance of the inception of sales programs and the like.

The complaint alleged that defendants have utilized available administrative and court procedures, in bad faith or without probable cause, knowingly or recklessly misrepresenting facts therein, making misleading statements of fact therein, multiplying and protracting proceedings thereunder, in bad faith or without probable cause, not to obtain settlement of issues, but with the intended effect of continuing and creating doubts and uncertainties, all for the purpose of preventing future diversion of all-rail traffic to petitioner.

The doubts and uncertainties created and prolonged by the continuing and repeated use of such means effectively has prevented Seatrain's growth, development, and expansion, thus depriving the public of the inherent advantages and benefits of Seatrain services.

Seatrain also sought an injunction against the several railroad defendants and their agent, the Association of American Railroads, from maintaining restrictions which said defendants and their agent had placed upon Seatrain and the railroads with which it connected at the ports with respect to the use of cars for movement of freight via Seatrain, claiming that these restrictions were directed solely at Seatrain and did not apply to any other carrier engaged in interstate commerce regardless of whether the carrier was a common carrier by railroad or common carrier by water. (There are a number of common carriers by water holding Certificates of Public Convenience and Necessity, issued by the Commission, which transport freight in railroad owned cars in interstate commerce.)

Reasons for Seatrain Seeking Relief from Federal Court

Seatrain brought this suit in Federal Court because the Interstate Commerce Commission found after extensive litigation that its jurisdiction with respect to the use of cars in connection with Seatrain was limited. This litigation was commenced in December 1932. The Commission rendered its final decision in 1941, affirming its previous finding that its jurisdiction to require railroad car owners to permit the use of their cars for the movement of freight via Seatrain or to or from the ports in connection with Seatrain was limited to those cars owned by railroads which participated in through routes with Seatrain. Appeals from this decision were taken by several railroads. The Commission's decision, however, was upheld by the Supreme Court in 1945, *United States* v. *Pennsylvania R. Co.*, 323 U. S. 612.

The number of cars belonging to railroads which maintain through routes with Seatrain is a minor fraction of the total cars in the so-called National Freight Car Pool, comprising all freight cars owned by the United States railroads. Shippers and carriers, other than Seatrain, as well as Seatrain, have for years suffered expenses, delays, and losses by not having the unquestioned right to use any or all cars for transporting goods in connection with shipments via Seatrain. The majority of the cars in the National Car Pool belong to those railroads which do not have or profess not to have through routes with Seatrain. As the Commission had held that it did not have any authority over cars belonging to railroads which did not participate in through routes with Seatrain, Seatrain sought relief from the Federal Court from the restrictions imposed by such car owners, through their agent, the Association of American Railroads.

In *Investigation of Seatrain Lines, Inc.*, 206 I. C. C. 328, 337, the Commission found that the "sole object (of the car restrictions—Car Service Rule 4) was to prevent the diversion of traffic from the all-rail routes to Seatrain." This finding was affirmed by the United States Supreme Court, *United States* v. *Pennsylvania R. Co., supra.* The Supreme Court, after reviewing various findings of the Commission as to the many advantages to the public which Seatrain service provided as compared with other services, said:

> "The 'inherent advantages of this service' would be lost to the public without railroad car interchange."
>
> "The particular type of service introduced by Seatrain, and found by the Commission to be qualitatively superior, cannot be rendered without the privilege of carrying the very railroad cars which carry the freight to its ports."

The Supreme Court further said:

> "This policy (the National Transportation Policy) cannot be carried out as to Seatrain's interstate carriage unless railroads interchange their cars with it." 323 U. S. 616, 617.

Seatrain sought the aid of the Federal Court in its anti-trust suit to have removed all restrictions with respect to the use of all cars over which the Commission lacked authority in order to have carried out the dicta of the

Supreme Court, above quoted. For the convenience of the Commission, a copy of the decision of the Supreme Court is attached hereto. Seatrain's suit to have all car restrictions removed was, therefore, in full accord with the views of the Supreme Court, above quoted.

Seatrain holds a Certificate of Public Convenience and Necessity, issued by the Commission, to operate as a common carrier of goods by water between the ports of New York, New Orleans, and Texas City. It also holds "Temporary Authority" to operate as a common carrier of goods by water between the ports of New York and Savannah. Said authority was granted to Seatrain by the Commission on November 13, 1951, upon a finding that there was "an urgent and immediate need" for the Seatrain service proposed. Certain railroads sought to have the order of the Commission granting said authority enjoined by the Federal Court. The Court denied the petition and affirmed the Commission's finding that there was substantial evidence of urgent public need. *Alabama Great Southern R. Co.* v. *United States*, 103 F. Supp. 223. These certain railroads stated unequivocally to the Commission and to the Federal Court that in that proceeding, the proposed service could not be rendered by Seatrain without their approval and consent as Seatrain did not have the right to use their cars or the cars of other railroads because there were no through rail and water routes in existence with Seatrain between New York and Savannah. They stated that they were unwilling to give their consents for the use of cars by Seatrain until the Commission satisfied their demands by fixing all terms and conditions as to car use. After one year of operation they still withhold their consents.

This same group of several powerful railroads had taken similar actions in connection with Seatrain's services between New York and New Orleans and between New York and Texas City, and for a period of twenty years had kept Seatrain in constant litigation and uncertainty for the purpose and with the intent of injuring Seatrain and depriving the public of the benefits of its service.

Having been restricted in the past from normal growth in its Gulf services and being faced with a similar situation in connection with its Savannah service, where the restrictions and obstacles to normal operation have been so great as to prevent the public from using the service which it urgently needed, Seatrain sought to have the Federal Court (a) remove the car restrictions with respect to all cars belonging to railroads which were not in fact parties to through routes with Seatrain, and (b) award damages to Seatrain for losses incurred by reason of the concerted actions of the defendants in causing the many uncertainties which had effectively prevented its normal growth and expansion.

This antitrust case was based, among other things, upon the above quoted findings of the Commission as to public need for Seatrain service, the inherent advantages thereof which the Commission had found, and the findings of the Supreme Court that Congress intended that the public should not be deprived of such inherent advantages. It was also based upon the finding of the Commission that the defendants, through their agent, the Association of American Railroads, had promulgated a rule with respect to the use of cars which precluded the public from obtaining the inherent advantages of Seatrain service—"the sole object (of such rule—Car Service Rule 4) was to prevent the diversion of traffic from the all-rail routes to Seatrain." *Investigation of Seatrain Lines, Inc.,* 206 I. C. C. 328-337. The Supreme Court, after affirming this finding of the Commission said: "Seatrain alone, of all the water carriers, according to the Commission's findings, has been refused car interchange. This means that the Association's rule, if valid, enables the railroads to decline to deal with Seatrain as it does with other carriers. As early as 1914, the Commission had declared that the Interstate Commerce

Act, as then in effect, prohibited railroad practices which lent themselves to such purposes" (323 U. S. 616, 617).

The above quoted findings clearly and unmistakably charge the railroads and the Association with acting concertedly (conspiring) to restrain trade. Seatrain has much additional proof, submitted in part to the Federal Court, that the defendants had and were acting in concert and conspiring to restrain trade. All such concerted actions are declared to be unlawful in the anti-trust statutes, but an injured person cannot obtain relief from the Court if any governmental agency has jurisdiction to grant the relief sought. The Commission having no jurisdiction, according to its own findings, over certain railroad owned cars, Seatrain sought the aid of the Federal Court to obtain relief from the restrictions as to those railroad owned cars over which the Commission had no jurisdiction. Seatrain petitioned the Federal Court to enjoin the defendants and their agent, the Association of American Railroads, from violating the law by their actions in restricting the use of their cars and those of other railroads which did not have or professed not to have through routes with Seatrain because their concerted action was designed "to prevent the diversion of traffic from the all-rail routes to Seatrain" and, therefore, was a violation of the anti-trust statutes.

Seatrain also sought damages with respect to other actions over which the Commission did not have jurisdiction, which actions have kept Seatrain in constant litigation and uncertainty for over twenty years and which have prevented its normal growth and expansion, all for the same purpose of preventing the diversion of traffic from the all-rail routes. Seatrain made clear to the Federal Court that the damages sought were not damages from violations of any provision of the Interstate Commerce Act. Damages for violations of the Act are recoverable under Sections 8, 9, and 16 thereof.

The damages for which Seatrain sued were caused by the concerted actions of the defendants over a period of years up to November 30, 1951, the date the Savannah service was commenced. The damages sought were the losses in earnings suffered by Seatrain in having its growth limited and restricted due to uncertainties precipitated by certain railroads which adversely affected Seatrain shippers, consignees, connecting railroads, and ports.

The underlying philosophy of regulation is to give all parties the right to a full hearing and fair trial at all times where their rights, privileges, and obligations are questioned. Seatrain recognizes that this philosophy is based upon the presumption that parties to a controversy or which cause a controversy are acting in good faith. However, Seatrain has found that when the parties do not act in good faith, the door which the law keeps open for the settlement of controversies may be used most effectively as a means of continuing the controversies for the purpose of injuring the opposing party.

Seatrain presented to the Federal Court extensive evidence to show that the concerted actions of the defendants in keeping matters in constant controversy and litigation had caused and were causing, particularly in connection with the Savannah service, such great uncertainties, risks, delays, losses of markets, fear of retaliation, and the like upon shippers, consignees, connecting railroads, and others, that Seatrain was unable to give the free, unobstructed, efficient, and uninterrupted service which it was capable of giving. These and other uncertainties which have arisen by reason of the concerted actions of the defendants have hampered Seatrain's past growth and expansion and caused it substantial losses in earnings. The damages sought do not result from violations by the defendants of specific provisions of the Act but rather from keeping the status of Seatrain services in doubt, confusion and uncertainty, all for the purpose of restricting Seatrain's growth and expansion so as to prevent the diversion of traffic from the all-rail routes to Seatrain. Actions such as these, when done pursuant to conspiracy, are deemed to be unfair trade practices under the anti-trust statutes, for which the parties injured by such unfair practices may recover treble damages. Seatrain sought to recover the damages it has suffered from the causes set forth above. It did not seek damages or reparations from the Court for violation of any provision of the Interstate Commerce Act.

Seatrain has been in a situation fully comparable with that of a person experiencing recurring boils. The victim of recurring boils may either have boils lanced as they come to a head, which, although beneficial, provides only temporary relief, or on the other hand, the victim must recognize that the cause of the recurring boils is an infection of the blood. Until that infection is cured, new boils will appear. Permanent relief can be obtained only from removal of the infection. Like the victim of recurring boils, Seatrain has been obtaining temporary relief from the Interstate Commerce Commission. The Interstate Commerce Commission is equipped with facilities and authority that would permit, to continue the simile, only the lancing of the boils as they come to a head. The Interstate Commerce Commission cannot provide a permanent cure so long as the infection persists.

Accordingly, Seatrain is seeking relief in the Federal courts and is asking the Federal courts to assist it in curing the infection which has precipitated and continues its malady. That infection is caused by the conspiracy on the part of the defendants in seeking to prevent the diversion of traffic from the all-rail routes to Seatrain.

Seatrain finds nothing in the Interstate Commerce Act that even closely resembles the investment in the Commission of authority to stop unfair trade practices, including litigation brought before it or caused to be brought before it or the Courts in bad faith for the purpose of injuring another carrier, thus lessening competition. Such concerted practices are prohibited by the anti-trust statutes in which the Federal Court is given jurisdiction to award treble damages as the means to stop such practices. Seatrain is seeking from the Federal Court the damages which it has suffered up to November 30, 1951, by reason of such unfair practices. Since November 30, 1951, it has suffered further extensive damages by reason of the continuation of such practices. Seatrain respectfully submits that it is entitled by law to recover whatever damages it can prove have been sustained as a result of such practices and it believes that its right to prove and recover the amount of such damages lies in the Federal Court. It believes its only right to prove and recover damages from the Commission is in connection with specific violations of the Act as provided in Sections 8, 9, and 16 thereof.

Principal Defendants in Anti-Trust Case

The principal defendants in the anti-trust proceeding are the Pennsylvania Railroad Company, the Southern Railway Company, the Atlantic Coast Line Railroad, and the Louisville and Nashville Railroad Company, together with the Association of American Railroads. It is from these railroads that Seatrain seeks recovery of treble damages for unfair trade practices and it is from the concerted actions of these railroads, the Association of American Railroads, and three other railroads, that Seatrain seeks injunctive relief with respect to the use of certain railroad owned cars.*

Prayers for Relief in Anti-Trust Case

A copy of the prayers for relief in the anti-trust action are attached hereto as Exhibit B. From these prayers it will be noted that Seatrain sought relief as aforesaid in connection with cars owned by railroads which do not have or profess not to have through routes with Seatrain and treble damages from the four primary defendants resulting from the alleged unfair trade practices.

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* With respect to four of the railroads named as secondary defendants, namely, The Delaware Lackawanna and Western R.R. Co., St. Louis-San Francisco Ry. Co., Lehigh Valley R.R. Co., and The New York Central Railroad, the suit has been dismissed.

Anti-Trust Case Dates and Action of the Court

The complaint in the anti-trust action was filed on December 10, 1951. All briefs were filed by and oral hearing held on April 14, 1952. On October 24, 1952, the District Court (a) denied Seatrain's Motion for a Prelminary Injunction with respect to removal of car restrictions and directed Seatrain to seek relief from the Commission with respect to the removal of car restrictions, and (b) granted Defendants' Motion to Dismiss the Complaint on the ground that the Commission has and has had jurisdiction to award damages for and give relief from the alleged unfair trade practices.

The Decision of the Federal Court

A. With Respect to Car Restrictions

In its decision, the Court disagreed with the Commission's previous holding that its jurisdiction to require car owners to permit the use of their cars in connection with Seatrain was limited to car owners having through routes with Seatrain.

In the Federal Court proceeding, Seatrain requested the Court to designate the provisions of the Act, if any, which gave the Commission jurisdiction over cars owned by railroads which did not participate in through routes with Seatrain. In finding that the Commission had jurisdiction to require all car owners to permit their cars to be used in connection with Seatrain transportation, the Court held that the Commission's authority with respect to the use of cars in connection with Seatrain movements, owned by any railroad, arose from the spirit of the decision of the Supreme Court in its interpretation of the National Transportation Policy. The Court concluded therefore, that *"The Commission must have the power"* to remove the car restrictions in order to carry out the

National Transportation Policy as interpreted by the Supreme Court. The Court further said: "*In the spirit of this interpretation* of the national transportation policy it appears that the *Interstate Commerce Commission has the jurisdiction and the power to direct such conditions of interchange* that will integrate Seatrain into the national transportation system as envisaged by the National Transportation Act of 1940 to the maximum use of its service and facilities subject, of course, to the standard of public necessity and convenience." (Emphasis supplied.) (Page 26 of Exhibit A.) The Court did not, as requested, cite any provision of the Act as vesting any greater authority in the Commission beyond the limits which the Commission repeatedly had defined.

The National Transportation Policy, which is a preamble to the Act and is not a provision or a Section thereof, admonishes the Commission to administer the Act as follows:

> "All of the *provisions of this Act* shall be administered and enforced with a view to carrying out the above declaration of policy." (Emphasis supplied)

The Interstate Commerce Commission, being an arm of the legislative branch of the Government, has such powers and only such powers as are specifically delegated to it. Its activities are bound by statute. *U. S. ex rel. CGW RR* v. *I. C. C.*, 71 Fed. (2d) 336.

Where there are no provisions in the Act specifically authorizing or which can properly be interpreted as specifically authorizing the Commission to act as to a particular matter, the Commission lacks jurisdiction to carry out the National Transportation Policy with respect to that matter. The Federal Court did not base its decision on any specific provision or provisions of the Act nor on its interpretation of any specific provision or provisions thereof. The most that can be said of the decision is that the Court stated that the Commission had broad powers with respect to car service matters and in a footnote cited all of the various provisions of the Act which had been considered by the Commission and the Courts in the long litigation with respect to car service. It should be noted that most of the provisions cited relate to the Commission's powers with respect to through routes, the facilities for the operation thereof, including cars, and its authority to fix reasonable terms and conditions in connection therewith. The other provisions cited, namely, Sections 1(10), 1(13) and 1(14)(a),* apply to car service matters of *common carriers by railroad.* The Court did not find that any of these provisions gave the Commission unlimited authority nor did it interpret any or all of these provisions as giving the Commission more authority than the Commission has heretofore held that it had.

Consequently, unless the Commission is found to have unlimited authority vested in it by reason of some provision or provisions of the Act heretofore overlooked or which now may be interpreted as giving it the authority, Seatrain cannot proceed to obtain from the Commission the relief sought from the Court. The Commission is without jurisdiction unless some provision of the Act vests it with the requisite authority.

The Decision of the Federal Court

B. With Respect to Damages

The Court found:

> "The *subsidiary charges* made by Seatrain as to *unfair competitive practices* upon the part of the defendants are incidental to the main allegations of the complaint that the defendants have conspired to deny to Seatrain interchange and use of freight cars owned by railroads. They must follow the

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* See pages 75-76 regarding certain provisions in Sec. 1(14)(a).

> *major charge as being within the jurisdiction of the Commission.*
>
> "Neither can this court maintain jurisdiction over the suit in so far as it claims treble damages from the primary defendants under the holding herein that the complaint charges acts cognizable under the primary jurisdiction of the Commission *which are remediable under its reparation power.*" (Emphasis supplied)

As heretofore stated, the principal relief which Seatrain is seeking in the anti-trust proceeding is relief from the constant uncertainties brought about by the never ending controversies with the defendants, which controversies and uncertainties have hampered Seatrain's ability to fully serve the public and have limited its normal earnings. To put an end to the various "unfair competitive practices" Seatrain sought substantial damages resulting therefrom *and therefrom alone.* For example, no damages were sought from any railroad for refusing to permit the use of its cars, or from the Association for restricting the use of cars.

In the above quotation of the decision, it should be noted the Court deemed the relief sought in connection with "unfair competitive practices" to be "subsidiary" to the "major" relief sought, namely, use of freight cars owned by railroads not having through routes with Seatrain. For the information of the Commission, it should be stated that insofar as Seatrain is concerned, the opposite is the fact and the Commission is respectfully requested to consider this petition in the light thereof, because it has now been clearly established, and more recently in the Savannah service, that the public has been denied the advantages of Seatrain service to which they are entitled because of the actions of the defendants other than actions which are or may be found to be in violation of specific sections of the Interstate Commerce Act.

Seatrain respectfully submits that it is entitled to damages from such actions. It is also entitled to damages for violations of specific sections of the Act. It is only the former type of damages which Seatrain sought from the Court and which the Court has found is recoverable through the Commission under its reparations powers. Based upon this finding, the Court held that it did not have jurisdiction to award damages resulting from the unfair competitive trade practices which Seatrain alleged had caused it substantial losses. The Court thereupon granted the Motion of the Defendants to dismiss the complaint.

This raises a serious question: Does the Commission have power to award damages to Seatrain upon proof that damages have been suffered because of alleged unfair competitive practices? Seatrain does not find any provision in the Interstate Commerce Act which declares the alleged unfair competitive practices to be unlawful. The Commission is without power to award damages (reparations) except those resulting from violations of specific sections of the Act (Section 16(1)). Furthermore, carriers are not liable to injured persons except for "damages sustained in consequence of any such violation of the provisions of this part . . . " (Section 8). Accordingly, it does not appear that the Commission has the authority to award damages for losses resulting from the uncertainties created by litigation brought, caused or carried on in bad faith or without probable cause and other actions not declared to be unlawful or prohibited in any Section of the Interstate Commerce Act.

Reasons for Use of Administrative Procedure Act

Under the facts outlined above, it is clear that there exists "uncertainty" as to the jurisdiction of the Commission with respect to the matters involved in the anti-trust proceeding. The issuance of declaratory orders with respect to its jurisdiction, or lack of it, will "terminate controversy". This petition, therefore, falls squarely within the stated provisions of Section 5(d) of the Administrative Procedure Act and particularly with respect to the following two matters:

> (1) Has the Commission authority to require a carrier or carriers which injure a competitor by keeping it in constant litigation, in bad faith or without probable cause, all for the purpose and with the intent of restricting or preventing the competition, growth and expansion of said competitor, to pay reparations for damages when bad faith is proven (a) as to cases before the Commission, and (b) as to cases before the Fedearl Courts?
>
> (2) Has the Commission the unlimited authority to require the use of every railroad owned freight car in connection with transportation via Seatrain?

Having been directed to seek from the Commission the damages sought from the Federal Court, Seatrain now asks for declaratory orders as prayed for herein. In the absence of specific statutory authority vested in the Commission, under the Interstate Commerce Act, Seatrain does not know how to proceed before the Commission to obtain the relief which it sought from the Court.

Seatrain desires to exhaust all possible administrative remedies available to it. Therefore, by this formal petition it is requesting the Commission to act under Section 5(d) of the Administrative Procedure Act, Seatrain has appealed the decision of the Federal Court and has petitioned the United States Supreme Court to review the decision of the District Court. As the Federal Court found that the Commission has unlimited authority to award the relief which Seatrain seeks, it is essential that the Commission determine whether it can, in its judgment, accord the relief prayed for by Seatrain in the Federal Court proceeding. Likewise it is essential that Seatrain exhaust all of its administrative remedies before it can obtain the relief from the Federal Court. A copy of this petition for declaratory orders is therefore being incorporated in the petition to the Supreme Court. Likewise, a copy of that petition is attached hereto as Exhibit C.

Other Remedies Suggested by the Federal Court

The Court indicates in its decision that Seatrain might obtain relief from the Commission from the uncertainties and prevent future losses therefrom, in a proceeding where all the many issues in dispute might be settled once and for all.

The Court found:

> "It is indeed regrettable that Seatrain should have been exposed to such time consuming procedures in airing its problems administratively and in the courts. Concededly, they involve intricate and delicate mechanisms functioning in a highly complicated area of industry and commerce. Perhaps the circumstances attendant upon the innovation of transportation of loaded freight cars in the manner of the Seatrain system and the interruption of the war years permitted no greater progress to the solution of the problems involved.
>
> "However, it would now appear that although some of the defendant railroads have for many years resisted the efforts of Seatrain to gain access to freight cars and have gainsaid the power of the Interstate Commerce Commission to direct it, certain of them including the primary defendants in this case, and others, filed a complaint with the Commission, on March 26, 1952, entitled The Alabama Great Southern Railroad Company, et al. v. Seatrain Lines, Inc., et al. Docket 31014. In it they state that they seek

> ' . . . a complete and authoritative determination of all of the problems involving Seatrain's relationship to the national transportation system, which would establish under the Commission's supervision a stable and proper relationship.
>
> 'The complainant railroads have accordingly concluded that the time has come when there ought to be a definitive and over-all solution of these many inter-related problems. It is insufficient, for a long-term solution, merely to establish that the court has neither jurisdiction nor authority to contrive this solution, nor should the railroads continue to await the piecemeal solution of the problems by this Commission in isolated controversies. Indeed, it is in the public interest that there be a comprehensive examination or re-examination of all the difficult issues between Seatrain and the railroads. It is in the interest of all that these problems receive authoritative over-all solution. Both Seatrain and the railroads have an obligation, to the public and to this Commission, to obtain resolution of these many issues and thus terminate what would otherwise be an unending controversy. In recognition of that responsibility, the complainant railroads file this comprehensive complaint.'

"All of the railroads which have or *might have through routes* with Seatrain, *or which might own cars that might be interchanged with Seatrain*, are made formal defendants in this proceeding. There would appear to be no reason why the allegations of Seatrain, as set forth in the complaint in this suit, may not be projected before the Commission in the course of its hearing and investigation of the above petition pending before it.

"Naturally Seatrain is suspicious of this move upon the part of the railroads and objects that many of the matters proposed by the petition have already been litigated before the Commission and that the petition has been filed in the hope of gaining further delay. It is a fact that heretofor fragmentary actions have been instituted before the Commission

> but with the interjection by Seatrain of the issues raised in this suit the proposed action should afford a complete review of them and the prescription of such terms and practices as may be determined to be just to Seatrain, the railroads and the public."

Seatrain does not admit the relevancy of the issues in Complaint—Docket 31014—to the issues before the Court. However it feels compelled to set forth here the facts with respect to said complaint because it was an exhibit filed with the Court by certain defendants in the anti-trust proceeding, which are also the complainants in Docket 31014.

The issuance of declaratory orders is discretionary with the Commission. For this reason, Seatrain believes that an analysis of the complaint in Docket 31014* will be helpful to the Commission in adjudicating this request for the issuance of the declaratory orders, particularly as the complaint in Docket 31014 appears to have confused the Federal Court with respect to its being a means to end the constant litigation.

Before the Court, Seatrain charged the complainants in Docket 31014 with bad faith in filing the complaint with the Commission and making it a part of their defense in the anti-trust proceeding. Whether or not there was bad faith on the part of these certain railroads is not an issue here before the Commission. The purpose of the following analysis of the complaint is to show that it would not accomplish the purposes alleged to the Court in the anti-trust proceeding and set forth in the complaint itself.

There are many reasons why the complaint would not and could not fulfill the stated purposes, but the following reasons will fully so demonstrate.

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* For the convenience of the Commission Docket 31014 is attached hereto as Exhibit D.

Reasons Why Complaint—Docket 31014—Could Not Fulfill Its Stated Purposes

(A) The complaint is not in fact a complaint upon which the Commission could proceed either now or in the foreseeable future to find "the definitive and over-all solution of these many inter-related problems" which are raised in the complaint, or of the many other outstanding issues which are omitted therefrom.

(B) The prayers for relief with respect to matters pertaining to the use of cars are predicated on the Commission's having only limited authority with respect thereof and not on the basis of the unlimited authority which the complainants and the defendant Association asserted the Commission had in the anti-trust proceeding. Either the Commission or the Court has jurisdiction over cars belonging to railroads which do not have through routes with Seatrain. The prayers in the complaint relating to car service matters are, therefore, not relevant to the solution of the issues with respect to use of cars other than those owned by railroads participating in through routes with Seatrain.

(C) The prayers in the complaint with respect to Seatrain's New York-New Orleans and New York-Texas City services and the allegations that these issues are now or have been for years in dispute between Seatrain "and the railroads" are neither consistent with nor supported by the facts.

(D) Not a single untried issue is raised in the complaint. The basic and related issues have been adjudicated one or more times. The complaint is nothing more than a petition for the reversal of findings of the Commission and the Supreme Court.

For the reasons more fully set forth hereafter as to each of the above points, Seatrain respectfully submits that this complaint could not be the means of settling any controversy with any party within the foreseeable future. Moreover, the complaint in Docket 31014 lists only the matters with which a few powerful railroads are concerned and does not include the many other issues in which Seatrain, its direct connections, and hundreds of other railroads are concerned together with their shippers and consignees.

Before presenting the relevant facts with respect to the above mentioned reasons why the said complaint could not accomplish its stated purpose, it is essential that the Commission consider this petition and the matters raised herein as to which declaratory orders are sought, with knowledge that Seatrain has alleged to the Federal Court that a conspiracy exists. That is the prerequisite to an anti-trust proceeding. Consequently, if the Commission has authority to grant Seatrain the relief sought from the Court, it must find that it has authority whether or not a conspiracy does or may exist. Seatrain does not seek to prove here that a conspiracy exists. Such proof is immaterial if it is determined that the Commission has jurisdiction to grant the relief prayed for in Federal Court. It is pertinent, however, to acquaint the Commission with some of the facts relied upon by Seatrain in Federal Court, showing that a conspiracy exists and by reason thereof damages have been incurred—damages resulting from actions that are not violative of specific provisions of the Interstate Commerce Act. The Federal Court has now directed Seatrain to obtain those damages by litigation before the Interstate Commerce Commission.

The Alleged Conspiracy as Presented to the Federal Court

As long ago as 1935, the Commission found that "the sole object (of car restrictions—Car Service Rule 4) was to prevent the diversion of traffic from the all-rail routes to Seatrain," *Investigation of Seatrain Lines, Inc., supra,* and that finding was affirmed in 1945 by the Supreme Court, *United States* v. *Pennsylvania R. Co., supra,* as follows: "The findings were that the sole object of the Association of Railroads' rule was to prevent diversion of traffic from the railroads to Seatrain." In the anti-trust proceeding, Seatrain submitted extensive evidence in the form of copies of letters, reports, recommendations, resolutions, and the like to show the continuing existence of the conspiracy. For full details, reference is made to the records in the anti-trust proceeding. Two complete sets of the documents were furnished the Commission. (See letter from Seatrain to Chairman Aldredge, dated June 13, 1952.) Seatrain respectfully requests that the record in the anti-trust proceeding, as aforesaid, be made a part of this petition, by reference.

Three of the exhibits relating to the alleged conspiracy are reproduced and attached hereto as Exhibits E, F, and G. Exhibits E and F herein (Exhibits 26 and 28 in Application for Preliminary Injunction—Anti-Trust Case) are reports made by Walter S. Franklin, then Vice President of the Pennsylvania Railroad, and J. F. Deasey, then Vice President of the Pennsylvania Railroad, to the Eastern Railroad Presidents, dated December 26, 1934, and May 10, 1935, respectively, in which they stated in part as follows:

EXHIBIT E (excerpt)

> "In conclusion, it is considered of utmost importance that this class of service be not recognized in the same category as the break-bulk routes generally accorded differential rates. Should this eventuate and it be not only free from the inherent disadvantages of break-bulk service but substantially equal of rail service, it will be readily appreciated that such Seatrain service would be extended not only along the entire Atlantic and Gulf coast and tributary rivers but would spread to the Great Lakes as well, and with free and unrestricted interchange with the rail carriers the inroads thus made upon all-rail business would be tremendous".

Exhibit F (excerpt)

> "In view of the adverse effect Seatrain Lines has on the eastern and southeastern carriers, it is my opinion that the railroads should take uniform action and not deliver any cars to the Seatrain Lines, Inc., such action being defended under the provisions of Car Service Rule No. 4, reading as follows:
>
> > 'Cars of railroad ownership must not be delivered to a steamship, ferry or barge line for water transportation without permission of the owners filed with the Car Service Division.'
>
> "A small group of railroads cannot legislate on per diem matters for all the railroads in the United States whose equipment might be subject to use by the Seatrain. Consequently, the New York Central Lines, the Erie and Pennsylvania Railroad cannot legislate on matters of this character. This must be placed in the hands of the A.A.R. in pursuance of the Car Service and Per Diem agreements. Therefore the matter of car hire should be referred to that body for their recommendations and their recommendations should be secured before any action is taken upon the question as to whether we shall or shall not establish through routes and rates via the Seatrain."

Exhibit G herein (Exhibit 29 in Application for Preliminary Injunction—Anti-Trust Case) is a report made by J. W. King and A. F. Cleveland, Vice Presidents of the Association of American Railroads, dated February 15, 1939, which reads in part as follows:

> "We believe there exist many reasons that will fully justify charges for the use of railroad equipment in excess of ownership cost. This principle, we believe, ought to be established by the Interstate Commerce Commission in order to prevent to the fullest extent possible the further development of vessel-ferry movement of freight cars which presently is threatened on the Pacific and Atlantic coasts and from the Atlantic to Texas ports. Every time an operation of this kind becomes effective, it adds to the rail competition and deprives the rail carriers

> of substantial revenues. Obviously, the higher the charge that can be justified for the use of railroad equipment, the less liability there will be of further extension of operations of this character."

The following is an excerpt from the Minutes of a meeting of the Board of Directors of the Association of American Railroads held on January 27, 1939:

> "Resolved:
>
> > "That the Officers of the Association be instructed to oppose the Seatrain in every way, including the case now pending before the I.C.C. and determine upon the proper method by the railroads to meet this competition."

The Commission's attention is invited to the fact that the charges made and the evidence submitted by Seatrain against the anti-trust defendants with respect to the conspiracy were neither disputed nor denied by them in that proceeding. The defendants rested their defense on the ground that relief sought by Seatrain from the alleged actions to destroy Seatrain or prevent its growth was not relief obtainable from the Federal Courts because the Commission had full jurisdiction to grant the relief sought regardless of concerted actions or conspiracy. The Federal Court accepted that contention and hence, Seatrain is here seeking the views of the Commission as to its jurisdiction through the issuance of declaratory orders. As to the conspiracy itself, however, it has been found to exist by the Commission. That finding was affirmed by the Supreme Court. It is confirmed by many other statements and actions of the conspirators and stands undenied in the Federal Court, but for reasons above stated the subject is not germane to the questions raised herein.

Underlying Basis of Complaint

Another reason why the complaint in Docket 31014 could not accomplish its stated purpose is found in the underlying basis of said complaint.

The complaint rests on the following fundamental basis:

> "This complaint proceeds on the premise that the Commission should recognize that Seatrain has inaugurated and seeks further to expand a novel transportation system which is unlike any other and is in fact a 'rail carrier by water', literally a 'Seatrain', which must be coordinated with the railroads on a proper and inclusive basis in the light of present conditions."

The complaint further states as follows:

> "Seatrain competes, in effect as a rail carrier, directly with the all rail services between these points on preferential terms. The complainants ask that the Commission recognize that this service is essentially a rail service, which it is in effect, so far as concerns the competitive and cooperative relations between Seatrain and the railroads, and ask that it be dealt with as such by the Commission from the standpoint of its obligations as well as from the standpoint of its privileges."

The status of Seatrain was the primary inquiry in *Investigation of Seatrain Lines, Inc.*, 195 I. C. C. 215, wherein the Commission found (p. 232) that Seatrain Lines, Inc., in providing "Seatrain type" service, is "not a common carrier by railroad or an extension of a line of railroad" but is "a common carrier by water." This finding was affirmed in the further report, 206 I. C. C. 328. These findings were again affirmed in *Seatrain Lines, Inc.* v. *Akron, C. & Y. Ry. Co.,* 226 I. C. C. 7, 31; 243 I. C. C. 199, and the Commission's decision as to through routes and joint rates rested thereon. In *Hoboken Mfrs. R. Co.* v. *Akron, C. & Y.*

Ry. Co., 234 I. C. C. 114, 115, the Commission again found that "Seatrain is a common carrier by water." In the car service cases the Commission rested its decision on the determination that Seatrain Lines, Inc., is a common carrier by water although it was urged that it was a "railroad." *Hoboken Mfrs. R. Co.* v. *Abilene & S. Ry. Co.,* 237 I. C. C. 97; 248 I. C. C. 109, 120. The finding that Seatrain is a common carrier of property by water was again affirmed in *Missouri Pac. R. Co. and T. & P. Ry. Co., Service by Water,* 245 I. C. C. 143, 144. The affirmative finding that Seatrain is a common carrier by water was also made by Division 4 in its decision of July 2, 1942 (unprinted), in Docket No. W-543, *Seatrain Lines, Inc., Common Carrier Applications,* and again in Docket No. W-543—Sub. No. 2—*Seatrain Lines, Inc., Temporary Authority Application,* decided November 13, 1951, and in *Alabama Great Southern R. Co.* v. *United States,* 103 F. Supp. 223, 226, as follows:

> "Lastly, Seatrain's method of operation does not declassify it as a carrier by water and render it ineligible for temporary authority under Part III of the Act. It has, of a surety, every characteristic of a common carrier of goods by sea. The railroads' portrayal of its services as analogous to all-rail service, governed by Part I, is plausible but unsound, because unreal."

The same finding has been made by the Supreme Court of the United States on two occasions. In *United States* v. *Pennsylvania R. Co.,* 323 U. S. 612, 613, the Court found:

> "Seatrain Lines, Inc., is a common carrier of goods by water."

In *United States* v. *Seatrain Lines, Inc.,* 329 U. S. 424, 425, the Court found again:

> "Seatrain Lines, Inc., is and long has been a common carrier of goods by water."

The records show that the reiteration of this finding was necessary only because in these various proceedings the complainants in Docket 31014 continued to assert that Seatrain was not in fact a common carrier by water but was "a rail carrier by water" and in effect a railroad. These complainants have continuously urged the Commission to deal with Seatrain accordingly.

Basically, the complaint in Docket 31014 is nothing more than a repetition of this time worn tactic of injecting the same concept into all Seatrain proceedings. Seatrain respectfully submits that its status as a common carrier by water cannot, as a matter of law, be changed either directly or indirectly, by attaching conditions to its certificates or the like.

Whether or not Seatrain is a common carrier by water is not the issue here. Seatrain here submits that said complaint could not accomplish its stated purposes, including the fundamental purpose to have the Commission now recognize that Seatrain is "a rail carrier by water" and in effect "a railroad" and to have the Commission regulate it accordingly.

Despite the fact that the complaint proceeds from the stated fundamental purpose of having Seatrain regulated as a railroad, the prayers for relief specifically and definitely request that Seatrain be treated in a manner wholly dissimilar from and unlike a railroad. Only two prayers seek treatment of Seatrain in any manner comparable with a railroad but, even as to those two prayers, terms and conditions are attached which either are non-applicable or unlawful. The prayers do not conform to the fundamental basis of the complaint. Therefore, the complaint does not even ask for the accomplishment of what purports to be the fundamental basis on which it is predicated.

Reasons Why Complaint—Docket 31014—Could Not Fulfill Its Stated Purposes

(A) The complaint is not in fact a complaint upon which the Commission could proceed either now or in the foreseeable future to find "the definitive and over-all solution of these many interrelated problems" which are raised in the complaint, or of the many other outstanding issues which are omitted therefrom.

The complaint states: "The complainant railroads have accordingly concluded that *the time has come* when there ought to be a definitive and over-all solution of these many interrelated problems." (Emphasis supplied)

It further states: "Both Seatrain and the railroads have an obligation to the public and to this Commission, to obtain resolution of these many issues and thus terminate what would otherwise be an unending controversy. In recognition of that responsibility the complainant railroads file this comprehensive complaint."

The complainants in Docket 31014 made similar statements to the Court, all to the effect that they sought to have the Commission proceed immediately to find an over-all solution to the many issues in dispute between Seatrain and "the railroads." There are various other statements to this effect in the complaint which are quoted as follows in order to remove any possible doubt as to what the complainants stated was their motive in filing this complaint:

> "This extended series of piecemeal controversies has produced neither a definitive over-all solution of the relationship between Seatrain and the railroads nor one which in ultimate result is consistent with the provisions of the Interstate Commerce Act." (Page 7)
>
> "Twenty years of piecemeal litigation has failed satisfactorily to resolve the relationship between Seatrain and the railroads." (Page 8)

> "What is important is a complete and authoritative determination of all of the problems involving Seatrain's relationship to the national transportation system, which would establish under the Commission's supervision a stable and proper relationship." (Page 10)

> "The complainant railroads have accordingly concluded that the time has come when there ought to be a definitive and over-all solution of these many interrelated problems. It is insufficient, for a long-term solution, merely to establish that the court has neither jurisdiction nor authority to contrive this solution, nor should the railroads continue to await the piecemeal solution of the problems by this Commission in isolated controversies. Instead, it is in the public interest that there be a comprehensive examination or reexamination of all the difficult issues between Seatrain and the railroads. It is in the interest of all that these problems receive authoritative over-all solution. Both Seatrain and the railroads have an obligation, to the public and to this Commission, to obtain resolution of these many issues and thus terminate what would otherwise be an unending controversy. In recognition of that responsibility, the complainant railroads file this comprehensive complaint." (Page 10)

> "As alleged above, complainants believe the time has come for a comprehensive examination and definitive resolution of all the many issues which after two decades still impair the relations between Seatrain and the railroads, *and that no further decisions should be made by this Commission with respect to isolated phases of the problem presented by Seatrain until such comprehensive investigation has been made in accordance with the allegations and prayers contained in this complaint* * * *." (Pages 22 and 23) (Emphasis supplied)

An examination of the complaint, together with the prayers therein, confirms the above statements with respect to the request made upon the Commission to combine and deal collectively with all of the issues raised therein. In fact, nine of the fourteen prayers pertain to issues dealing with Seatrain's New York-New Orleans service, New York-Texas City service, and New York-Savannah service, but these nine prayers are based upon and are subsidiary to two other prayers. These nine prayers relate to such matters as the fixing of terms and conditions in connection with the operation of through routes and the terms and conditions in connection with the use of cars on such through routes. Obviously the Commission could not make determinations as to such matters without first establishing through routes or finding that through routes are already in existence. In turn, the establishment of through routes or the existence of through routes depends upon the establishment of rates, including joint rail and water rates, or the existence of such rates. It is, therefore, not possible for the Commission to determine reasonable terms and conditions and other issues in connection therewith until the routes and rates are determined.

But Prayer (2) reads as follows:

> "Prescribing, *if the Commission should grant Seatrain,* over the opposition of some of these complainants, *permanent authority to operate* between Edgewater, N. J., and Savannah, Ga., such reasonable through routes as may be found necessary or desirable, in the public interest, pursuant to Section 15(3), between points in eastern and southern territories over the lines of complainants and defendants, including Seatrain, via Edgewater, N. J., and Savannah, Ga.;". (Emphasis supplied)

Prayer (8) reads as follows:

> "Prescribing, *if the Commission,* over the oppotion of some of these complainants, *should grant Seatrain permanent authority to operate* between Edgewater, N. J., and Savannah, Ga., reasonable joint rail-water, water-rail and rail-water-rail class rates and commodity rates between all points on the lines of complainants and defendants in eastern and southern territories in connection with Seatrain via Edgewater, N. J., and Savannah, Ga., over such through routes as may be found necessary or desir-

> able, in the public interest, pursuant to Section 15(3)." (Emphasis supplied)

Therefore, the complainants seek the relief only "*if the Commission should grant Seatrain permanent authority to operate between Edgewater, N. J., and Savannah, Ga.*" It is submitted that the Commission cannot properly proceed with this complaint, as drawn, unless and until final determination be made in the Seatrain permanent authority case dealing with New York-Savannah operations.

Seatrain filed its application for temporary and permanent authority to operate between New York and Savannah on October 15, 1951. It commenced operations a year ago. The present status of the permanent proceeding is as follows: Hearings have been held, in which the complainants in Docket 31014 took many exceptions to rulings of the Examiner. Certain complainants in Docket 31014 have already appealed some of the Examiner's rulings to the Commission. Such appeal is pending before the Commission. If the Commission should overrule the Examiner and admit certain evidence, further hearings will have to be held. As of necessity the date for filing briefs has been postponed from time to time pending final decision of the Commission with respect to the Examiner's rulings.

Final determination of the permanent authority application will depend upon various matters over which neither Seatrain nor the Commission has control. The complainants in Docket 31014, for the past twelve years have taken every decision of the Commission, to which they were parties, with respect to Seatrain matters, into the Federal Courts.*

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* (a) Car Service Case, *Hoboken Mfrs. R. Co.* v. *Abiline & S. Ry. Co., supra;* (b) Commission's Amended Order Specifying New York-New Orleans, *Seatrain Lines, Inc.* v. *Akron C. & Y. R. R. Co., supra*—order dated Dec. 5, 1944; (c) Edgewater Rate Case, *Borough of Edgewater, N. J.* v. *Arcade & A. R. Corp., supra;* (d) Temporary Authority Case, *Seatrain Lines Inc., Temporary Authority Application,* Docket No. W-543 (Sub. No. 2).

In any event, there can be no final determination with respect to permanent authority in the near or foreseeable future. By then some or many of the issues involved in the complaint will have become moot. The extent to which issues become moot, however, will rest in part upon the granting or denying of the request of the complainants to withhold all decisions in connection with "the problem presented by Seatrain until such comprehensive investigation has been made in accordance with the allegations and prayers contained in this complaint." We respectfully submit that a request upon the Interstate Commerce Commission to deny any injured party relief, to defer the enforcement of its orders, and to defer rendering decisions on issues already before it is a most extraordinary request and to say the least is facetious and frivolous. It would not maintain the status quo which is its objective, even if granted, because shippers, consignees, communities, ports, other carriers and Seatrain have the right, under the Act, to seek relief from the Federal Courts. To emphasize this point the complaint in Docket 31014 does not include all of the disputes between the complainants and Seatrain, its shippers, consignees, and connecting carriers. It contains only those issues which the complainants are interested in, for one reason or another. This extraordinary attempt to debar or at least indefinitely delay Seatrain, its shippers, consignees, connecting carriers, and the like, from seeking relief in connection with the problems which the complainants have created contravenes the statement of complainants in Docket 31014 that they recognize that they have "an obligation, to the public and to this Commission, to obtain resolution of these many issues and thus terminate what would otherwise be an unending controversy."

We respectfully submit that the request to keep matters in status quo would not terminate but would perpetuate the controversies indefinitely, because, as shown above, the prayers for relief being inter-related, are conditioned upon the happening of a future event and the relief prayed for is sought only *if* final determination is made in the permanent application case and then only *if* decided in a certain way.

Furthermore, it should be pointed out that no carrier which has been restricted in its operations, such as Seatrain has been between New York and Savannah, can continue indefinitely to suffer the losses arising therefrom. It must either obtain prompt relief, from the Commission or the Courts, from the restrictions and the obstructions, or find other ways and means of extricating itself from its difficulties. Sooner or later a carrier so oppressed and unable to obtain relief would be forced to curtail its operations, regardless of public need, to conserve its resources to continue other operations. If Seatrain were unable to obtain relief and economic conditions compelled it to discontinue its Savannah service, the prayers with respect to Seatrain's New York-New Orleans and New York-Texas City services would remain untried and unsolved. The complaint so requests.

The many statements in the complaint to the effect that the time has now come to terminate all of the controversies once and for all are, therefore, not supported by the prayers for relief. For these reasons, as well as others hereinabove and hereinafter stated, this complaint could not accomplish its stated purpose.

Reasons Why Complaint—Docket 31014—Could Not Fulfill Its Stated Purposes

(B) The prayers for relief with respect to matters pertaining to the use of cars are predicated on the Commission's having only limited authority with respect thereof and not on the basis of the unlimited authority which the complainants and the defendant Association asserted the Commission had in the anti-trust proceeding. Either the Commission or the Court has jurisdiction over cars belonging to railroads which do not have through routes with Seatrain. The prayers in the complaint relating to car service matters are, therefore, not relevant to the solution of the issues with respect to use of cars other than those owned by railroads participating in through routes with Seatrain.

On December 30, 1932 and on March 9, 1933, The Hoboken Manufacturers Railroad Company and the New Orleans and Lower Coast Railroad Company, respectively, filed complaints with the Commission, Dockets 25728 and 25878, requesting the Commission to require the railroads, in general, to cease and desist from refusing to permit the delivery of their cars to Seatrain. The Hoboken was the direct rail connection of Seatrain at New York, and Lower Coast was and is the direct connection of Seatrain at New Orleans.

Prior to the final decision of the Commission, dated October 13, 1941, most of the railroads over whose lines traffic moved in connection with Seatrain, had voluntarily withdrawn the restrictions in connection with the use and delivery of their cars to Seatrain, not only as to the New York-New Orleans service, but also as to Seatrain's new service between New York and Texas City. There has been no issue brought to the Commission with respect to car service matters in connection with the Texas City service. By reason of these voluntary actions of many railroads, the final order of the Commission in the so-called Car Service case (*Hoboken Mfrs. R. Co.* v. *Abilene & S. Ry. Co., supra*), was made applicable to only a few roads over whose lines any traffic had moved in connection with Seatrain. Fifteen roads appealed the Commission's decision to the Supreme Court. Six of these roads subsequently withdrew from all opposition to Seatrain and voluntarily entered into full working arrangements with Seatrain, not only with respect to Seatrain's New Orleans service, but voluntarily with respect to Seatrain's Texas City service. Of the nine remaining appellants before the Supreme Court, there were three railroads with whom Seatrain had never participated in any transportation, namely, the Great Northern, Northern Pacific, and Union Pacific. The remaining appellants were the Pennsylvania Railroad including its wholly owned subsidiary, The Long Island Railroad, The Atlantic Coast Line, The Southern, The Louisville and Nashville, and The Seaboard, they being the principal defendants in the anti-trust case and the principal complainants in Docket 31014.

Throughout the nine years of litigation before the Commission, and the four years of litigation before the Federal Courts, these five roads and their subsidiaries maintained that the Commission had no power whatsoever to require any railroad to permit the use of its cars in connection with any transportation via Seatrain. In this litigation before the Commission, the Association of American Railroads adopted the same view as to the Commission's lack of jurisdiction. The Commission found that it had jurisdiction, but only with respect to cars owned by railroads having through routes with Seatrain. In the appeal of this decision to the Supreme Court, these roads stated as follows:

> "The Interstate Commerce Act creates no duty on the part of carriers by railroad to furnish their cars for transportation on the ships of a carrier by water such as Seatrain, and confers no authority

> upon the Interstate Commerce Commission to compel railroad carriers to perform any such alleged duty. That Congress did not intend to, and did not, create such duty or confer such power is shown by the phraseology of the provisions of the Interstate Commerce Act, by the lack of express provision for such duty or power, by the detail in which Congress enumerated the duties imposed upon the carriers and the powers granted to the Commission, and by the history of the Act."

On the other hand, in their brief in support of their Motion to dismiss Seatrain's complaint in the anti-trust proceeding, which brief was adopted by the Association, these roads completely reversed their position and stated as follows:

> "If the refusal of some railroads to allow use of their cars were ever shown to be a significant interference with the operation of a through route, the Commission, under authority conferred by Sections 1(4) and 15(3), 49 U. S. C. para. 1(4) and 15(3), *has ample power* to order the interchange of cars, even though the railroads concerned were not parties to through routes with Seatrain. See United States v. Pennsylvania R.R., 323 U. S. 612, 619 (1945). Either, then, the failure of some railroads to consent to the use of their cars by Seatrain does not in fact operate to limit the traffic moving via Seatrain's vessels or, if it does, the Commission has authority to order the disregard of Car Service Rule 4, both (a) as an unreasonable rule with respect to the operation of the through routes, under Sections 1(4) and 15(3) of the Act, 49 U. S. C. Para. 1(4) and 15(3); and (b) as a discriminatory or unequal practice with respect to a connecting carrier under Section 3(4) of the Act, 49 U. S. C. para. 3(4)." (Emphasis supplied)

In a supplemental brief filed by the Association, it also reversed its views and stated as follows:

> "The jurisdiction of the Commission over car utilization and interchange, which had theretofore

> rested upon its authority with regard to the establishment and operation of through routes, was implemented and enlarged by the enactment in 1917 of the Esch Car Service Act, sections 1(10)-(17) of the Interstate Commerce Act. Under these sections of the Act, it is the duty of every railroad 'to establish, observe and enforce just and reasonable rules, regulations and practices with respect to car service.' Section 1(11). The Commission is authorized to make general or special orders requiring all carriers by railroad to file with it their rules and regulations with respect to car service, and the Commission may, in its discretion, direct that such rules and regulations be incorporated in schedules showing rates, fares and charges for transportation, and be subject to any or all of the provisions of the Act relating thereto. Section 1(13). The Commission may, after hearing, upon complaint or upon its own initiative without complaint, establish reasonable rules, regulations and practices with respect to *car service by common carriers by railroad,* and penalties or other sanctions for non-observance of such rules, regulations or practices. Section 1(14)(a). Whenever the Commission is of opinion that shortage of equipment, congestion of traffic or other emergency requiring immediate action exists in any section of the country, the Commission is authorized, either upon complaint or upon its own initiative without complaint, at once, if it so orders, without answer or other formal pleading, and with or without notice, (a) to suspend the operation of any or all rules, regulations or practices then established with respect to car service for such time as the Commission may determine and (b) to make such just and reasonable directions with respect to car service without regard to ownership as between railroads as in its opinion will best promote the service in the interest of the public and the commerce of the people. Section 1(15). *It would be difficult to imagine more complete jurisdiction over the matter of car service than is thus vested in the Interstate Commerce Commission.*" (Emphasis supplied)

Particular attention is called to the last sentence above quoted because it furnishes further substantial grounds to justify the request herein for the issuance of declaratory orders. For several years, during the proceedings before the Commission in the so-called Car Service Case, *Hoboken Mfrs. R. Co.* v. *Abilene & S. Ry. Co., supra,* the Association took the position that the sections above cited, as well as other sections referred to in the last mentioned proceeding but not quoted above, did not give the Commission any authority, whatsoever, to require car owners to permit their cars to be used in connection with Seatrain service. The various sections of the Act which the Association now asserts invest in the Commission unlimited authority were in effect during the entire Car Service Case and are still in effect. Therefore, when the Association asserts that "it would be difficult to imagine more complete jurisdiction," it actually is confessing that it heretofore carried on litigation before the Commission and the Courts without probable cause.

As stated heretofore, the complainants in complaint Docket 31014, stated to the Commission in the case involving Temporary Authority to operate between New York and Savannah, as well as to the Federal Court upon appeal of the Commission's order therein, that Seatrain could not operate the proposed New York-Savannah service without their consent and the consent of many other railroads with respect to the use of their cars, the asserted reason being that there were no through routes in existence between Seatrain and the lines of these many railroads. These roads pointed out that the Commission, according to its decision in the so-called Car Service Case, was without power by reason of the lack of through routes to require railroads to permit the use of their cars, and without cars, Seatrain could not operate the proposed service.

This same argument and line of reasoning has been used by these railroads in other cases, some now pending before the Commission. In spite of the reversal of views as to the jurisdiction of the Commission, these allegations with respect to the Commission's limited authority have not been stricken nor modified in such cases to conform to the allegations made to the Federal Court in the antitrust proceeding. Particular attention is called to the following statement made by counsel of the Pennsylvania Railroad on March 5, 1952 in Docket 30954, *Routing Via Seatrain Through Edgewater, N. J.*:

> "The major purpose of maintaining the restriction in the tariffs is to avoid creating conditions which might give rise to an implication that the Pennsylvania and Seatrain have entered into a common arrangement for continuous carriage. It is important that such conditions do not arise in order to insure that should through routes be established via the Pennsylvania and Seatrain they shall be established only pursuant to the order of the Commission in order that the Commission may have jurisdiction over the terms and conditions under which the through routes are operated including the terms and conditions governing the use of Pennsylvania cars in Seatrain service."

On April 1, 1952, the Pennsylvania Railroad stated to the Federal Court that the Commission's judisdiction with respect to cars was not limited to cars owned by railroads having through routes.

On April 21, 1952, after asserting to the Federal Court that the Commission had complete jurisdiction over all cars, regardless of the existence or non-existence of through routes between Seatrain and the car owners, the Pennsylvania Railroad filed another document with the Commission in Docket 30954, which in summary stated:

> "The tariff note involved in this proceeding was published for the express purpose of showing the non-existence of a through route."

The stated purpose of said tariff note and the note itself is meaningless in view of the assertions made by the

Pennsylvania Railroad to the Federal Court. For the same reason, the complaint is meaningless.

Another illustration of wholly inconsistent positions, taken by the complainants in Docket 31014, is shown in the statement which they made to the United States District Court for the Eastern District of Virginia, on December 14, 1951, in *Alabama Great Southern Railroad Co.* v. *United States, supra,* as follows:

> "So far as we know, at the moment, there are only perhaps two methods whereby the Commission could have control over Seatrain's use of cars. One of these would be a condition in connection with the grant of permanent authority." . . .
>
> "Now, the other way in which they could control cars, but which I think is not perfectly germane to us in this application matter, is in prescribing through routes, and there they have a right also, under the statute 15(3), to prescribe terms and conditions."

In the aforesaid proceeding, the complainants in Docket 31014 were seeking to have the Court set aside the Commission's order granting temporary authority to Seatrain to operate between New York and Savannah, contending that the order should be set aside because Seatrain could not operate without the right to use the cars which brought freight to its ports and that the Commission itself lacked the authority to require railroads to permit their cars to be used in connection with the temporary operation, alleging that there were no through routes in connection with such service. Three and one-half months later, in the United States District Court at Trenton, N. J., in their defense in the anti-trust proceeding, the complainants in Docket 31014 took a position directly contrary to the above, as heretofore shown, and stated that the Commission had and always had complete authority to require all railroad owned cars to be used in connection with Seatrain services.

An examination of the prayers for relief in Docket 31014 shows that the complainants seek a determination of car service matters limited wholly to the use of cars, including the terms and conditions in connection therewith, *over through routes.* Seatrain, like all other carriers, transports a considerable volume of freight on combinations of local rates, in connection with which through routes may or may not exist. It transports considerable port to port freight as to which through routes with carriers other than the switching carriers at the ports could not exist. The prayers for relief, therefore, are on a much more limited basis than that over which the Commission found it had jurisdiction. Prayers (4) and (6) read as follows:

> "(4) Requiring Seatrain to provide reasonable facilities for operating *such through routes* as may be in existence or prescribed, now or hereafter, including an equitable portion of the cars attributable and appropriate to its use, or in the alternative, requiring Seatrain to pay a per diem rate which shall fully reflect its peculiar and unusual character and type of car use"; (Emphasis supplied)
>
> "(6) Fixing reasonable terms and conditions under which *such through routes* shall be operated and all terms and conditions of car use to be observed by Seatrain, including the compensation to be paid by Seatrain for its use of railroad cars, and the manner and method of payment." (Emphasis supplied)

For twenty years Seatrain has sought the removal of the restrictions which apply solely to it as to the use of cars in connection with its service. Now that the defendants in the anti-trust proceeding, including the Association, admit that the Commission has "complete jurisdiction" with respect to all cars, it is submitted that the Commission could not carry out the stated purposes of the complaint and make an over-all determination of all issues on the basis of the restricted prayers in said complaint limiting the relief to the use of cars owned by railroads participating in through routes with Seatrain and only where through routes exist. This is true whether or not the Commission has the unlimited jurisdiction which the complainants and the Association alleged in the Federal Court.

Now is not the time for the Commission to proceed to determine car service matters while a conflict exists as to its jurisdiction and that of the Federal Court with respect thereto. Until there is a final determination with respect to jurisdiction, the Commission cannot make over-all determination of the car service issues. The Commission cannot make final over-all determination as to car service matters unless and until there are brought into the proceeding, as parties, the Association and at least several of its members who have always refused to consent to have their cars delivered to Seatrain.

Despite the sweeping decision of the Supreme Court, Car Service Rule 4 of the Association stands as originally written without amendment. Rule 4 continues to prohibit Seatrain's direct connections from delivering any cars to Seatrain, regardless of the existence or non-existence of through routes and only if the owners thereof have filed with the Car Service Division of the Association consents as to the use of their cars in particular Seatrain routes. The Association is neither a complainant nor a defendant in Docket 31014. Obviously, it must be made a party to any proceeding involving use of cars in the National Freight Car Pool of which it is the rule making body and manager.

For these reasons, a determination by the Commission of the limited prayers for relief with respect to car service as set forth in the complaint in Docket 31014 would not fulfill the stated purposes of the complaint and thereby bring about an over-all solution of the car service issues which are in dispute between Seatrain, the Association, and only a few of its members.

Reasons Why Complaint—Docket 31014—Could Not Fulfill Its Stated Purposes

(C) The prayers in the complaint with respect to Seatrain's New York-New Orleans and New York-Texas City services and the allegations that these issues are now or have been for years in dispute between Seatrain "and the railroads" are neither consistent with nor supported by the facts.

The disputes with respect to Seatrain's two Gulf services are between the Pennsylvania Railroad on the one hand, and, on the other, every other railroad in New England, the East, and the Southwest, together with Seatrain. To a lesser extent, a similar situation exists as to the Savannah service. The disputes in connection with the Savannah service are between a few railroads, on the one hand, and, on the other, all other railroads and Seatrain.

The repeated statements in the complaint that there are many problems and issues between Seatrain "and the railroads" are, therefore, incorrect. Similarly, the stated purposes of the complaint are incorrect.

Eleven of the fourteen prayers for relief relate to Seatrain's Gulf services, New York-New Orleans and New York-Texas City. The complaint states that the time has come to resolve the many issues in dispute as between Seatrain "and the railroads". With respect to Seatrain's Gulf services, there is not now nor has there been for many years any dispute with respect to any of the matters mentioned in the said complaint as between Seatrain and any railroad except the Pennsylvania Railroad. With respect to the New Orleans service, what the complaint seeks is a reversal of the findings and decisions of the Commission and the Federal Courts with respect to Seatrain's New York-New Orleans service and the scrapping of all of the voluntary arrangements entered into between Seatrain and every railroad in New England, the East (Pennsylvania excepted), and the Southwest with respect to Seatrain's New York-Texas City service.

Because of the voluntary cooperation of all other railroads as to the Texas City service, it was not necessary for the Commission to adjudicate rates, routes, divisions, terms, conditions, car service matters, and the like with respect to that service. Many of these roads entered into the voluntary arrangements prior to the Commission's decision with respect to the New Orleans service. Railroads which had not voluntarily entered into working arrangements with Seatrain prior to the Commission's decisions pertaining to the New Orleans service, accepted the Commission's decisions and orders in connection therewith and simultaneously and voluntarily entered into similar working arrangements with Seatrain for its Texas City service, all in accordance with the principles and findings of the Commission set forth in its decisions with respect to the New Orleans service.

The Pennsylvania is the only railroad against whom the aforesaid orders of the Commission were applicable which refused to comply with the Commission's Amended Order of June 2, 1945.

The Pennsylvania Railroad is the only railroad which has refused to enter into any voluntary arrangements whatsoever with respect to Seatrain's Texas City service. Furthermore, it is only the Pennsylvania which has failed and refused to comply with the Commission's order in *Borough of Edgewater, N. J.* v. *Arcade & A. R. Corp.*, 273 I. C. C. 710; 280 I. C. C. 121.

Therefore, it is not a fact, as stated in the complaint, that the issues therein are in dispute between Seatrain "and the railroads." It is a fact that such issues are in dispute between the Pennsylvania on the one hand, and Seatrain and the railroads throughout New England, the East, and the Southwest, on the other hand, all of whom are made defendants in Docket 31014.

In these circumstances, it is apparent why the Pennsylvania, being so all alone, seeks the relief prayed for only if it has support from other primary railroad defendants in the anti-trust case, together with the Seaboard, whose interests are in connection with the Savannah service, and then only if Seatrain obtains permanent authority to operate between New York and Savannah.

While Seatrain has not entered into complete working arrangements with the many other railroads named as defendants in Docket 31014, in connection with its Savannah service, there are in effect most of the arrangements as to the Savannah service except the establishment of joint rail and water rates. Joint rates have already been effectuated with some roads. Other roads have agreed with Seatrain to put joint rates into effect. Others have assured Seatrain that they will put them into effect as soon as the situation growing out of the present litigation becomes clarified. Such railroads do not wish to appear to be taking sides at the moment, although such railroads are issuing through bills of lading, have filed consents permitting their cars to move, and are doing other things called for in the normal course of joint transportation.

As will be more fully shown in the next section hereof, there are no new issues raised in said complaint. With respect to the New Orleans service, the Pennsylvania seeks a reexamination of the old issues. In doing so, it charges all of the railroads in New England, the East, and the Southwest, with violating the law by having accepted the Commission's decisions with respect to the New Orleans service and having applied the principles thereof to the New York-Texas City service. The real defendants in Docket 31014 are the Interstate Commerce Commission and the Supreme Court of the United States. Seatrain and all the railroads except the Pennsylvania are merely nominal defendants for having accepted the letter and the spirit of the decisions of the Commission and the Supreme Court. In view of these facts, the complaint is not what it purports to be, nor could it accomplish its stated purpose.

Reasons Why Complaint—Docket 31014—Could Not Not Fulfill Its Stated Purposes

(D) Not a single untried issue is raised in the complaint. The basic and related issues have been adjudicated one or more times. The complaint is nothing more than a petition for the reversal of findings of the Commission and the Supreme Court.

The first and last prayers of the complaint in Docket 31014 are the usual catch-all prayers.

Prayers (2) and (3) request the Commission to prescribe through routes in connection with Seatrain's Savannah service and in connection with Seatrain's Gulf services.

Prayers (4), (5), (6), (12), and (13) request the Commission to prescribe reasonable rules, regulations, terms, conditions, and use of facilities in connection with the aforesaid through routes.

Prayers (7), (8), and (9), request the Commission to prescribe reasonable rates for Seatrain, both port to port and joint rail and water over the aforesaid routes.

Prayers (10) and (11) request the Commission to fix reasonable divisions of joint rail and water rates.

Prayers (2), (3), (4), (5), (6), (7), (8), (9), (12), and (13), pertain to issues which already have been adjudicated as to Seatrain's New York-New Orleans service after exhaustive consideration.

The arguments used to justify the request for "the reexamination" of these issues with one exception are the same arguments which were advanced by the complainants in the proceedings in which these issues were determined. The one exception mentioned is the statement now made that inasmuch as some coastwise water lines have not been able to restore their services since World War II, Seatrain carries more coastwise traffic. Even if correct, that would not constitute reasonable grounds for reexamination of the issues.

As to the prayers for the prescription of divisions, it is pertinent to observe that Seatrain previously requested the Commission to fix divisions in connection with joint rail and water rates. These requests were withdrawn because all of the railroads with which Seatrain has established joint rates, voluntarily agreed to accord Seatrain the same divisions of the joint rates as they accorded other water carriers. The Pennsylvania Railroad was included among the railroads that voluntarily established divisions with Seatrain. The Pennsylvania Railroad voluntarily participated in divisions for a brief period just prior to the requisitioning of all Seatrain vessels for war use. There is not now, nor has there been, any issue as to divisions in connection with any of Seatrain's services, for the reason that all railroads having joint rates with Seatrain have voluntarily agreed with Seatrain in connection therewith. Seatrain has no joint rates at present with the Pennsylvania, Southern, Atlantic Coast Line, Seaboard Air Line, or the Louisville & Nashville. Any issue as to divisions of joint rates between Seatrain and these complainants, therefore, will not arise unless and until joint rail and water rates are established in connection with the Savannah service or unless other railroads establishing Savannah joint rates raise the divisional issue.

The two cases in which all of the principal issues raised in the complaint in Docket 31014 were determined, were started on December 28, 1932, and December 30, 1932, by Seatrain and its then wholly owned subsidiary, the Hoboken Manufacturers Railroad Company, Dockets 25727 (*Seatrain Lines, Inc.* v. *Akron, C. & Y. Ry. Co., supra*) and 25728 (*Hoboken Mfrs. R. Co.* v. *Abilene & S. Y. Co., supra*), respectively.

The former case, commonly referred to as the "Through Route-Through Rate Case", pertained to the issues which are included in prayers (2), (3), (7), (8), and (9) of the complaint in Docket 31014.

The latter case, commonly referred to as the "Car Service Case", pertained to the issues which are included in prayers (4), (5), (6), (12), and (13) of the complaint in Docket 31014.

Other than the two aforementioned proceedings in no other case in which Seatrain has participated have any of the matters contained in the prayers of the complaint in Docket 31014 been at issue. In many other cases, however, the complainants in Docket 31014 have sought to inject these issues, although not pertinent thereto. Accordingly, there will not be found a single finding of the Commission relating to the issues raised in the prayers of the complaint in Docket 31014 that is not included in the aforesaid two proceedings. It is Seatrain's contention in the anti-trust proceeding that the tactics of the defendants therein in seeking to inject over and over again irrelevant and adjudicated issues in other proceedings* was one of the means adopted of furthering their conspiracy for the purpose and with the intent of injuring Seatrain by delaying the proceedings, confusing the proceedings, and creating uncertainties and fear on the part of shippers, Seatrain, and its connecting carriers.

Throughout the complaint in Docket 31014, the complainants repeatedly contend that the various issues, which they now ask be combined, were brought to the Commission by Seatrain in piecemeal fashion and by reason thereof, there never has been an over-all determination.

To illustrate this point, the complainants list fourteen cases in which Seatrain has been involved. One case listed was a Federal Maritime Commission case involving the legality of Foreign Trade Conference contracts. (Cuban trade.) Another case involved an extension of a route by another coastwise carrier. Another case pertained to the status of a proposed service by the Florida East Coast Car Ferry Company between New Orleans and Havana. (It should be noted that the Commission found the service therein proposed with car-carrying vessels was that of a common carrier by water.) An analysis of the issues and decisions in connection with the remaining cases listed shows no relevancy to any of the issues raised in said complaint, except for the two cases which Seatrain and its subsidiary brought in 1932.* Therefore, neither the allegations with respect to past piecemeal handling, nor the cases listed, are consistent with or pertain to the prayers in the complaint.

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* See pages 25-27, 78 as examples.

As further evidence of the lack of substance in the "piecemeal" charge, the chronologies of the two dockets in which the issues raised in said complaint were adjudicated are attached hereto as Exhibits H & I. For information, those exhibits also appear as Annexes A and B in Seatrain's Application For Preliminary Injunction in the antitrust case.

From these chronologies, it will be seen that Seatrain sought to have these cases tried in proper order, or combined, and that the complainants in Docket 31014 continuously opposed that orderly method of procedure. Unfortunately, as shown in the chronologies, the railroads' strategy of keeping the proceedings separate to delay ultimate disposition prevailed. As the result, the final decision in the Through Route-Through Rate Case was not promulgated until December 23, 1940, and the final decision in the Car Service Case was not announced until October 13, 1941, eight and nine years respectively after the complaints in each were filed. (See Exhibits H and I.)

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* The two proceedings mentioned were instituted by Seatrain and its subsidiary company only because of the activities of certain railroads or their refusal to act.

These chronologies, in the light of subsequent events, show clearly, plainly, and precisely, how the complainants in Docket 31014 took advantage of the regular procedures of the Commission. Because the Commission's procedures are designed to give full hearings and fair trials, the complainants, in bad faith, by filing numerous motions, petitions, and other pleadings, and by securing unnecessary hearings and delays for hearings, prevented the Commission from making final decisions with respect to the basic responsibilities of the parties, all continuing and creating uncertainty for Seatrain, its railroad connections, and shippers, with respect to their obligations and rights, and thus preventing normal growth and expansion over a period of some years, all for the purpose and with the intent of preventing the diversion of traffic from the all-rail routes. It will become manifestly clear that the complaint in Docket 31014 was designed for a like purpose, with a like intent and to deceive the Federal Court with respect to its true purposes. Can the Commission award reparation for damages resulting from such actions designed to create and continue uncertainties rather than to settle them before the Commission and the Federal Courts? That is the question here.

Investigation of Seatrain Lines, Inc. 195 I. C. C. 215 (1933); 206 I. C. C. 328 (1935)

On October 4, 1932, shortly after the first announcement by Seatrain that it intended to carry traffic between New York and New Orleans coincidentally with the carriage of traffic in its Cuban services, the Commission on its own motion entered into an investigation to determine the facts with respect to many charges made by various railroads, including the defendants in the anti-trust proceeding accusing Seatrain of unlawful acts and improper practices. It also sought to determine whether Seatrain was a common carrier by water or was a railroad or an extension of railroad within the meaning of the Act, as alleged by said defendants and others. On October 6, 1932, Seatrain inaugurated expanded service with the first of two new Seatrain vessels built in America. The various charges with respect to improper and unlawful practices were found by the Commission to be without substance or foundation. The Commission also found that Seatrain was not a common carrier by railroad nor an extension of railroad, but was a common carrier by water. This finding was in conformity with its findings that the proposed service of the Florida East Coast Car Ferry Company between New Orleans and Havana was that of a common carrier by water. None of the prayers in the complaint in Docket 31014 pertain to any of the issues decided by the Commission in *Investigation of Seatrain Lines, Inc., supra.* That proceeding is relevant to this petition only because of statements made in the complaint, as heretofore mentioned, regarding the carrier status of Seatrain.

The Contentions of the Parties and the Findings of the Commission with Respect to the Issues in the Through Route-Through Rate Case

The issues raised in prayers (2), (3), (5), (7), (8), and (9), are the same issues raised and determined by the Commission in the Through Route-Through Rate case. 226 I. C. C. 7 (1939); 243 I. C. C. 199 (1940); 259 I. C. C. 297 (1944). In the Through Route-Through Rate case Seatrain contended that the railroads were unlawfully refusing to recognize the existence of through routes between their lines and Seatrain in connection with certain traffic and had failed and refused to establish through routes with Seatrain on other traffic. Seatrain also contended that the railroads in general had failed and refused to enter into joint rail and water rates with Seatrain on the same level and under the same terms and conditions as they were contemporaneously maintaining with Seatrain's water carrier competitors.

The contention of the railroads, as well as Seatrain's water line competitors who intervened and filed a cross-complaint, charged that the maintenance by Seatrain of port to port rates the same as the port to port rates of other water carriers was unreasonable and that the joint rail and water rates which Seatrain had established with certain railroads on the same level and under the same terms and conditions as such railroads contemporaneously maintained with the other water lines was unreasonable. Certain railroads, defendants in the Through Route-Through Rate Case, supported these contentions of the water lines and attempted to justify their refusals to establish joint rates with Seatrain on the ground that Seatrain, in demanding establishment via its line of the going rail-water level, was unreasonable.

The basic argument of certain defendant railroads and the water lines was that Seatrain service was in effect a rail service irrespective of whether or not Seatrain was a common carrier by water; that rail service was more valuable than the type of water carrier service being rendered by the other water carriers; that shippers should be required to pay more for Seatrain's more valuable service; that Seatrain's service being the equivalent of rail service, all of Seatrain's port to port and joint rates should be on the basis of the all-rail level; that the terms, conditions, rules and regulations in connection therewith should be the same as the all-rail terms, conditions, rules and regulations; and that the Commission should prescribe rates for

Seatrain on the all-rail basis and establish through routes in connection therewith.

Seatrain contended that its service was far superior to that of the other water carriers; that in certain respects it was equal to all-rail service; that it was performing this service at a cost materially below the cost of other water carriers and far below the cost of all-rail; that by reason of its ability to give better service by water at a cost less than other water carriers, the public was being benefited by the improved service without having to pay higher rates, and coincidentally, by making savings in transportation expense by the elimination of packing, claims, and the like; that Seatrain's superior service at water carrier rates had opened new markets for commerce; that the public would never receive the benefits of improved transportation if the carrier rendering the improved service were required to charge higher rates for the sole purpose of preserving less efficient carriers and thus penalizing an improved transportation service. Because of its lower operation costs, Seatrain could profitably provide its service to the public at rates no higher than those of other water carriers.

As shown in Exhibit H hereof, the Commission exhaustively investigated the contentions of the parties and after making a study of the costs found that Seatrain's costs were no greater than those of the other water carriers and were probably less. The findings of the Commission with respect to these points are set forth below:

> "Those who urge the higher basis of rates over Seatrain's routes plainly are not concerned over the possibility that shippers may escape a just contribution to carriers' revenues, but fear that their own interests may suffer through a diversion of traffic from competing carriers to Seatrain in the event that the latter secures the basis of rates which it here seeks" (243 I. C. C. 199, 212).
>
> "In connection with these contentions it is of interest that the rule of rate-making in section 15a has

> been recently amended so as to require us, in the exercise of our authority to prescribe just and reasonable rates, to 'give due consideration, among other factors, to the effect of rates upon the movement of traffic *by the carrier or carriers for which the rates are prescribed* . . .' This admonition is repeated in sections 216(i) and 307(f), containing rules for rate making relating to motor and water carriers, respectively. The words which have been italicized for emphasis are of particular interest. They were not in either of the bills originally passed by the Senate and the House of Representatives but were added by the committee of conference. Their meaning, supported also by the legislative history, seems to be that no carrier should be required to maintain rates which would be unreasonable, judged by other standards, for the purpose of protecting the traffic of a competitor'' (243 I. C. C. 199, 214).
>
> ''The result would also be to deprive shippers of much of the benefit of an improvement in service which has been accomplished without increase in the cost thereof, the purpose of such deprivation being to protect the carriers which continue to offer the old and inferior service. That such a result will diminish, if not remove, the incentive for making such improvements seems clear'' (243 I. C. C. 199, 215).
>
> ''Making full allowance for the fact that these averages are based on assumptions and deductions and are at best approximations, we may safely conclude from the cost evidence that the Seatrain unit costs are no greater than those of the break-bulk lines and probably are materially less'' (243 I. C. C. 199, 210-211).

That the Commission has not changed its opinion with respect to the level of rates to be charged by low cost carriers is shown in its last annual report (Sixty-Fifth) to Congress, which states as follows:

> ''We have not required higher rates to be charged by one means of transportation in order to provide

> protection for another form not justified by transportation conditions."

As stated above, the complainants in Docket 31014 have not set forth facts or arguments which would justify a reversal of the findings of the Commission with respect to the level of rates to be charged by Seatrain, nor have they referred to any decision or finding by the Commission indicating that it has in any way altered its views with respect thereto. The Commission's views that it cannot lawfully require a low cost carrier to charge higher rates to reduce competition with, to protect, or to preserve higher cost carriers, even when the service of the low cost carrier is superior or merely equal to that of higher cost carriers is prevailing law.

The railroads contended that there were no through routes in existence between themselves and Seatrain; that the proportional rates which they maintained and which specifically provided all the terms, conditions, rules and regulations for interchange with water carriers docking at Hoboken engaged in the coastwise, intercoastal, export and import trades, were not applicable in connection with Seatrain because Seatrain was not really a carrier by water—it was a "rail carrier by water."

The railroads also contended that they were not obligated to issue through bills of lading in connection with movements via Seatrain on freight which they moved to the port under their proportional rate tariffs because such rates were not proportional rates in connection with a "rail carrier by water." The railroads contended that their actions in requiring shippers to make so-called local shipments to the ports on local rail bills of lading, and requiring shippers to take possession and control of their goods at the ports and to reship under new and separate bills of lading via Seatrain, to pay separate charges in connection with the two bills of lading, to settle claims separately, and the like, were, therefore, not unlawful.

In answer to the railroads' contention with respect to through routes, proportional rates, and through bills of lading, Seatrain contended that it was a common carrier by water, engaged in the coastwise, export, and import trades; that the proportional rates of the railroads were applicable in connection with all water carriers; that to exclude Seatrain by not applying the rates, terms, conditions, rules, regulations, services, obligations and responsibilities undertaken and performed for all other water carriers was an unlawful discrimination against Seatrain, which the Commission was asked to remove by requiring the application of the published proportional rates including all of the terms, conditions, rules, regulations, services, obligations, and responsibilities. Having contended that the proportional rates were applicable in connection with Seatrain, Seatrain further contended that such proportional rates, together with the proportional rates, which it published, created, of necessity, through routes as between the railroads and Seatrain and, therefore, the railroads were required by law to issue through bills of lading.

With respect to the contentions of the parties, the Commission's finding in Docket 25727, *Seatrain Lines, Inc.* v. *Akron C. & Y. Ry. Co., supra,* were as follows:

> "A through route may be generally described as an arrangement, express or implied, between connecting carriers for continuous carriage from a point on the line of one to a destination on the line of another" (226 I. C. C. 7, 17).
>
> "While a joint rate is not essential to show the existence of a through route, the establishment of joint rates presupposes through routes. *Western Pac. R. Co.* v. *Northwestern R. Co.,* 191 I. C. C. 127, 131. Likewise a combination of proportional rates necessarily reflects agreement to establish a through route. *Great Northern Ry.* v. *Sullivan,* 294 U. S. 458, 460" (226 I. C. C. 7, 17).
>
> "Where joint ocean-rail rates do not exist in connection with Seatrain, combination rates apply.

> The factors of the trunk-line and New England carriers are their local or proportional rates to or from Hoboken. The proportional rates apply on traffic moving to or beyond the port of New York, which includes Hoboken, by coastwise water carriers and are not limited so as not to apply in connection with Seatrain, which, at the time of the hearing, had been operating in coastwise service for four years. Seatrain publishes proportional basing rates to and from the ports." (226 I. C. C. 7, 18).
>
> "It thus appears that where joint rates are not applicable in connection with Seatrain, the rates in numerous instances are combinations of proportional rates and in other instances combinations of proportional and local rates." (226 I. C. C. 7, 19).
>
> ### "REFUSAL TO ISSUE THROUGH DOMESTIC BILLS OF LADING
>
> Defendants refusal to issue such bills of lading is based on their contention that through routes do not exist in connection with Seatrain. Where through routes do exist, Section 20(11) requires the issuance of through bills of lading." (226 I. C. C. 7, 31).

The prayers of the complaint in Docket 31014 request the establishment of through routes. When joint rates are established, through routes automatically come into existence. To the extent that Seatrain now maintains joint rates with railroads, the through routes are already in existence. Any railroad which maintains a proportional rate tariff to or from any port which Seatrain serves, which tariff specifies that the rates contained therein apply in connection with coastwise transportation and contain the terms and conditions applicable in connection with the receipt, delivery or interchange of goods with a coastwise line, has established a through route in connection with Seatrain because Seatrain maintains proportional tariffs providing for the receipt, delivery or interchange of goods with the rail carriers at all ports it serves.

The Commission's finding quoted above, that where two or more carriers maintain proportional rates,* a through route exists of necessity, is the prevailing law. It must always prevail, because rates are not proportional rates unless the terms, conditions, and services in connection therewith, as shown in the tariffs of the rail and water carriers, provide for all the services necessary for the delivery and receipt of the freight as between said carriers at the ports. Such terms, conditions, and services make it unnecessary for a shipper to take delivery and give receipt for his goods at the port and to arrange for the continued transportation thereof with another carrier to the consignee at the ultimate destination. Accordingly, each proportional rate is a proportion of the total rate from origin to the ultimate destination because of the terms, conditions and services attached thereto. A shipment may move under two proportional rates from origin to ultimate destination without the shipper taking possession or control of his goods enroute and without doing anything else to accomplish the transportation of the goods to the consignee. Therefore, a shipment moving under two proportional rates is a shipment moving on a through route which is any arrangement for the carriage of goods from origin to ultimate destination in through and continuous carriage which makes it unnecessary for a shipper to intervene or take possession or control of his goods enroute. Therefore, two proportional rates, of necessity, create a through route.

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* Section 6(11)(b) of the Act defines proportional rates of rail and water carriers as follows:

> "To establish proportional rates, or maximum, or minimum, or maximum and minimum proportional rates, by rail to and from the ports to which the traffic is brought, or from which it is taken by the water carrier, and to determine to what traffic and in connection with what vessels and upon what terms and conditions such rates shall apply. *By proportional rates are meant those which differ from the corresponding local rates to and from the port and which apply only to traffic which has been brought to the port or is carried from the port by a common carrier by water.*" (Emphasis supplied)

Seatrain submits that the proportional rates referred to by the Commission in the above quoted finding, which it found of necessity created through routes, are still applicable at Hoboken piers, and the Hoboken pier rates are also applicable to piers at Edgewater as shown in the tariffs of the New England and Eastern railroads, including the Pennsylvania. Some of these tariffs became effective December 17, 1951, by reason of the decision and order of the Interstate Commerce Commission. (*Borough of Edgewater, N. J.* v. *Arcade & A. R. Corp., supra*). In that case, after extensive consideration and reconsideration by the Commission, later unsuccessfully appealed by the railroads to the Federal Court, the Commission found that the port of Edgewater was being discriminated against as compared with the port of Hoboken, because the same rates, terms, conditions, rules, regulations and services, were not being offered to Edgewater piers to the same extent as to Hoboken piers. All the roads above mentioned were ordered to cease and desist from the discrimination and to place Edgewater piers on the same competitive basis as Hoboken piers.

The tariffs filed in response to this order carry the following clause:

> "Class Rates—Application of Rates
>
> On export, import, coastwise and intercoastal traffic between Official Classification Territory (See Note A) and Edgewater Docks, N. J., class rates published to or from Hoboken, N. J., (H.M.R.R.) under Item 1215, page 95 of Tariff, will apply, except where specific class rates to or from Edgewater Docks, N. J., are in effect, the latter will apply. (Notes B and C)

Commodity Rates

On export, import, coastwise and intercoastal traffic between Official Classification Territory (See Note A) and Edgewater Docks, N. J., commodity rates published to or from Hoboken, N. J., (H.M. R.R). under Item 1215, page 95 of Tariff, will apply, except where specific commodity rates to or from Edgewater Docks, N. J., are in effect, the latter will apply. (Notes B and C)

Note A.—Official Classification Territory referred to herein is the territory described in Items 1525 and 1527 of tariff.

Note B.—On traffic from Edgewater Docks, N. J., routes will be as provided in New York, Susquehanna & Western Railroad Company Routing Guide 44-A, I. C. C. A.-40.

On traffic to Edgewater Docks, N. J., routes will be as provided in the individual tariffs or routing guides of the originating carrier.

Note C.—Not applicable for account of New York Central Railroad, to or from industries named in Item 764 of Tariff, as amended under sub-caption "deliveries" at Edgewater, N. J., N.Y.C.R.R. (W. S.)

Waybill to 'EDGEWATER DOCKS, N. J.' "

(See Supplement 14 to Tariff 116-E, I. C. C. ‡A-931, issued by C. W. Boin, Agent, Trunk Line Territory Tariff Bureau)

As the Eastern and New England railroads, including the Pennsylvania Railroad, have been ordered to maintain proportional rate tariffs applicable to Edgewater piers in connection with coastwise movements the same as they maintain and have maintained to Hoboken piers, the prayer in Docket 31014 to establish through routes, which, of necessity, already exist by reason of said order, is meaningless.

Merely because one complainant railroad violates the orders of the Commission and refuses to apply its tariffs, does not justify a request to establish through routes where already existent and operative by all other carriers. Violations of tariffs or orders of the Commission do not destroy the existence of through routes, contentions to the contrary notwithstanding.

The complaint in Docket 31014 by its prayers does not allege unlawfulness of the existing rules, regulations, terms and conditions in Seatrain's tariffs and in the tariffs of the hundreds of railroads which maintain joint rates and proportional rates in connection with Seatrain. As the complaint does not contain any statement why any rule, regulation, term, condition or practice in existence is unlawful, and as the rates themselves, in large part are Commission prescribed, more justification should be required to support the allegations of unlawfulness contained in the complaint, before the Commission could properly proceed therewith.

It is of the utmost significance that the complaint specifically limits and restricts the relief it seeks to Edgewater, New Jersey, and to Belle Chasse, Louisiana, in its New York-New Orleans service. The authority of Seatrain to operate is not limited to operations at Edgewater, New Jersey, nor to those at Belle Chasse, Louisiana. If the prayers, as purposely drawn, were granted, obviously Seatrain and the Commission in the future would again be faced with necessary redetermination of the rates, routes, terms and conditions to be applicable at any pier area within the Port of New York, other than Edgewater, New Jersey, or within the Port of New Orleans, other than Belle Chasse, Louisiana, in the event that Seatrain desired or was compelled to move or sought to extend its terminals and services at these ports.

This statement is fully justified by past events. The Commission is familiar with the extensive litigation made necessary when Seatrain moved its terminal from Hoboken, New Jersey, to Edgewater, New Jersey, precipitated by the failure and refusal of certain railroads to apply equally to the new terminal at Edgewater, New Jersey, the rates, routes, terms and conditions prescribed in *Seatrain Lines, Inc.* v. *Akron C. & Y. R.R. Co., supra,* and particularly in the Commission's orders of January 28, 1938, December 5, 1944, issued in connection therewith.

The prayers in Docket 31014 are not prayers for the regulation of Seatrain as or like a railroad, with two possible exceptions. One of these possible exceptions pertains to the level of rates which the complainants desire Seatrain to maintain. Heretofore, in many proceedings, where the level of rates was not an issue, as well as in the Through Route-Through Rate Case, the railroads contended that Seatrain should be required to charge the same rates which the railroads themselves control, fix and maintain.

In a recent proceeding (Finance Docket 17357) the Commission was requested to place a condition on the operating rights sought by Seatrain requiring the maintenance of the all-rail rate level. (To require such conditions is only another method of restricting the operating rights which Seatrain has under its Certificate of Public Convenience and Necessity. The Supreme Court in *United States* v. *Seatrain Lines, Inc., supra,* found that conditions could not be inserted in a Certificate once issued and effective. Obviously the Commission could not properly by such indirect means restrict operating rights of water carriers in view of the mandate of the Supreme Court.)

It is evident that the complainants in Docket 31014 are again seeking to have the Commission fix Seatrain's rates on the all-rail level. To that extent, and to that extent only, do these rate prayers ask for or indicate that the complainants want Seatrain to be regulated as or like a railroad.

The objective in seeking to have the Commission fix Seatrain's rates on the all-rail level has been and is obvious. It was recently confirmed by counsel for the complainants in Docket 31014 in a recent proceeding, Finance Docket 17357, when at page 209 of the transcript he said: "I think counsel for the applicant (Seatrain) will admit that unless he is able to charge the lower differential rate, it will be a death knell to the Seatrain service". The lower differential rate under discussion was any rate lower than the all-rail rate. It was in that proceeding that the complainants in Docket 31014 sought to have the Commission require Seatrain to charge all-rail rates as a condition to the grant of any authority to operate.

It is not necessary to rely upon past actions or such statements of counsel to prove that the objectives of the complainants in Docket 31014 are not to settle the issues once and for all. That said complainants seek to put Seatrain out of business once and for all, is shown by their prayers seeking the prescription of divisions. The complainants do not propose therein that Seatrain be accorded the divisions which it would receive if it were a railroad. They propose that Seatrain's divisions be the remainder of the through rate after the railroads, as their divisions, receive their local rates to and from the ports.

For a substantial amount of the available traffic, the sum of the local rail rates to and from the ports exceeds the through all-rail rate from origin to destination. This means that Seatrain would receive nothing as its proposed division of the all-rail rate, and presumably would be called upon to make up the difference between the all-rail rate and the sum of the locals. That, of necessity, would follow if the railroads were to receive their proposed divisions, namely, their local rates to and from the ports.

On the majority of the available traffic, the proposed divisions for Seatrain on the average would be less than its present port to port rates, varying downward from its present rates to zero. The division proposed for Seatrain on such traffic being less than Seatrain's present port to port rates, would accord to Seatrain revenues less than those which the complainants allege in Docket 31014 and in other proceedings are unreasonably low. The proposed division, as measured by their own yard stick, would be unreasonably low and, therefore, unlawful.

In view of the above, neither the complaint nor its prayers for relief as to rates, routes, terms, conditions and divisions, could accomplish its stated purposes. Clearly the end result sought is to deprive the public of Seatrain service and the inherent benefits and advantages thereof. These issues are obviously not raised for the purpose of settling them once and for all, but either to put Seatrain out of business or to restrict its growth by keeping it in constant uncertainty.

The Contentions of the Parties and the Findings of the Commission and the United States Supreme Court with Respect to the Issues in the Car Service Case

The issues raised in prayers (4), (6), (12) and (13) are the same issues raised and determined by the Commission and the Supreme Court in *United States* v. *Pennsylvania R. Co., supra.* They are the same issues which the primary defendants in the anti-trust proceeding have injected into many other proceedings before the Commission and the Federal Courts. They are the issues described in more detail in said complaint in paragraphs 22, 23, 24, 25 and 26. They are the issues which the primary defendants in the anti-trust proceeding, together with the Seaboard and the Association, demanded that the Commission determine before enforcing its order in 243 I. C. C. 199 (1940). The Commission determined these issues in 248 I. C. C. 109 (1941). The primary defendants and several other railroads previously named, appealed this decision of the Commission to the Federal Courts. In 323 U. S. 612, the Supreme Court of the United States upheld the Commission's decision and order and reviewed the contentions of the appellants with respect to the issues above mentioned.

The findings of the Commission and the Supreme Court with respect to these five issues were not conditioned upon or restricted to particular conditions existing at or in connection with the location of Seatrain's terminals at Hoboken, New Jersey, and Belle Chasse, Louisiana, these terminals being within the port of New York and the port of New Orleans, respectively. The findings of the Commission and the Supreme Court are broad findings as to the responsibilities and obligations of rail carriers in connection with the transportation of freight in loaded freight cars by Seatrain, a common carrier by water. Because the Commission found that its jurisdiction was limited with respect to the cars which might be used in connection with Seatrain, its order in the above mentioned proceeding, of necessity, pertained solely to railroads which maintained through routes with Seatrain between Hoboken and Belle Chasse. Notwithstanding that fact, it cannot be said that the findings of the Commission and the Supreme Court with respect to the terms and conditions as to use pertained to a service by Seatrain only between those two specific locations in said ports.

Throughout the proceeding before the Commission and the Federal Courts, the primary defendants contended that they should not be required to comply with the Commission's order, because Seatrain should pay ten times the established per diem rate for cars while en route in a Seatrain vessel. They contended that the established and then current rate of per diem was a reciprocal arrangement between car owners and did not cover their ownership costs. They contended that Seatrain was not a car owner, and, therefore, would be subsidized by other car owners if it neither contributed to the car supply nor paid more than the established per diem rate. They claimed that Seatrain had an improper advantage over the railroads because when cars were returned empty to Seatrain by its direct connections at the ports, Seatrain solicited and secured traffic originating locally at the port, loaded the cars and returned them (as required by the Car Service rules) to its direct connection from which it had originally received the loaded car. Thus by soliciting, securing and carrying traffic originating locally at the ports, the percentage of empty cars handled by Seatrain was materially less than the percentage of empty car movement of the railroads. Seatrain was thereby accused of good management, as well as good car service practice, in securing maximum utilization of cars.

The railroads also contended that the car service rules provided (with respect to rail carriers) that the obligations and responsibilities of the receiving railroad in connection with all cars began as of 12:01 A.M. on the day following receipt. These railroads complained that Seatrain's direct connections were not forcing Seatrain to take immediate delivery of cars upon arrival at Seatrain's terminals, and, therefore, Seatrain was being given an improper advantage and preference.*

In answer to these contentions, Seatrain pointed out that the current rate of per diem had been fixed by the railroads, reviewed by the Commission, and these records showed that the full cost of ownership was covered by the then current rate; that the then current rate was not a reciprocal rate because there were many railroads and water carriers which did not own any freight cars or any substantial number that were in general use in the so-called National Freight Car Pool. Seatrain pointed out that one of the large items of expense in connection with the ownership of freight cars was repair expense incurred by reason of the movement of cars over the rails and through the classification yards. Seatrain pointed out in connection with cars in its possession, that the car owner would make substantial savings in running repairs and that the then current rate of per diem would result in more profit to the car owner for a car while in use by Seatrain than it would make from the same car if it was in normal railroad use.

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* This is the other contention in Complaint—Docket 31014—that Seatrain should be regulated as a railroad.

With respect to these particular contentions, the Commission in its decision, dated October 13, 1941, found as follows, *Hoboken Mfrs. R. Co.* v. *Abilene & S. Ry. Co., supra*:

> "Rule 1 thereof (Car Service and Per Diem Agreement) provides that the rate for the use of freight cars, to be known as the per diem rate, shall be $1 per car per day.* This has been the per diem rate for many years, and in *Rules for Car-Hire Settlement*, 160 I. C. C. 369, 378, we said:
>
> > The per diem rate is supposed to reflect the average cost, to the owner, of freight-car ownership and maintenance, and embraces cost of repairs, cost of taxes, cost of replacements, miscellaneous expenses, and 6 percent interest on investment. From the evidence of record, it is estimated that the cost of car ownership and maintenance averaged 83.812 cents per car day and $305.91 per car unit in the calendar year 1925, and approximately $1 per car day in that year for the periods cars were actually in service. Cars were idle a portion of the year, due in part to unserviceable condition, and in part to the fact that the supply of cars exceeded the demand".

The Commission further found as follows:

> "The record indicates that the present cost does not exceed that amount".

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* The current rate is $2 per car per day which is being paid by Seatrain.

With respect to running repairs, the Commission found as follows:

> "Repairs account for a large proportion of the cost of car ownership. Defendants concede that about 61.5 percent of the average running repair expenses of 16 cents per car per day, or about 9.8 cents, are avoided when cars are not moving".

It further found as follows:

> "In all of the circumstances, we find no good reason why Seatrain should pay a higher per diem rate than the $1 now applied uniformly by the car-hire rules, especially when the record shows, and it is admitted, that the cost of maintaining the cars is decreased approximately 10 cents per day while they are in its possession".

With respect to the other contentions of the railroads, the Commission said:

> "So far as the movement of empty cars is concerned, Seatrain holds itself ready to move in the home direction cars which it has moved in the opposite direction under load. It argues that it should not be penalized because it happens to have a well-balanced traffic and consequently can furnish loads for many such cars, or because the delivering railroads prefer to return others by rail. Moreover, the evidence shows that Seatrain does move a very substantial number of empty cars, routing them preferably by Havana in the hope that there they may pick up loads. It is also shown that a large volume of traffic via Seatrain originates or terminates at the ports, and that a supply of cars for traffic so originating is there maintained at Seatrain's expense.
>
> "Of equal importance is the fact that as between railroads there is no such balancing of burdens as defendants would imply. Not all railroads own cars. Granting that the more important are car owners, there is no reason to believe that the ownership is always proportionate to car use. There are also

> railroads which, by reason of location, are essentially bridge carriers with much less than the normal amount of car origination, termination, and intermediate switching. There are railroads which, by reason of well-balanced traffic, have much less than the normal proportion of empty car movement. The car-hire rules do not differentiate between railroads because of such differences in conditions. It is also the fact that these rules have always been applied uniformly where cars are interchanged voluntarily with water lines, such as the various so-called car ferries. For almost four years prior to the inauguration of its coastwise service the railroads freely interchanged cars with Seatrain and its predecessor in the Belle Chasse-Havana service at the regular per diem rate. Moreover, a large number of railroads operating in official and southwestern territories, some of which are defendants in these proceedings, have voluntarily consented to the delivery of their cars to Seatrain at that rate. Also, 19 defendants which have not consented to the use of their cars by Seatrain in its coastwise traffic permit such use in its Cuban traffic at the prevailing per diem rate.
>
> "In all of the circumstances, we find no good reason why Seatrain should pay a higher per diem rate than the $1 now applied uniformly by the car-hire rules, especially when the record shows, and it is admitted, that the cost of maintaining the cars is decreased approximately 10 cents per day while they are in its possession".

As to whether Seatrain should own a proportionate share of freight cars, Seatrain's position was that it would purchase and maintain freight cars to the extent that the Commission should find that it was desirable so to do. Seatrain contended that under the existing car service rules, if Seatrain should be a substantial car owner, its cars would not be available for general use or its own use, but would remain idle at the ports. Seatrain's position was supported by the testimony of the Chairman of the Car

Service Division of the Association. As to this point, the Commission found as follows:

> "So far as car ownership is concerned, Seatrain has offered of record to acquire cars for interchange with the railroads if and when such acquisition is desirable from the standpoint of the car supply of the country. The witness from its Car Service Division who testified on behalf of the association was unwilling, upon inquiry, to state that such acquisition would be desirable under the then existing circumstances. It appears, also, that Seatrain rents a substantial number of privately-owned cars".

As to whether Seatrain's direct connections should require Seatrain to accept immediate delivery of *loaded cars** upon arrival at its terminals, Seatrain proved that the tariffs of all railroads serving U. S. ports including its direct connections, provided that the railroad under the applicable rate and established divisions offered to hold freight in cars free of further charge against the shipper for a certain number of days, varying with the trade engaged in by the water carrier. Seatrain proved that in connection with all other water carriers, freight was so held in cars at the ports free of charge and for longer periods than the average time in connection with Seatrain, and that a like situation existed in connection with car detention on shipments being delivered by water carriers to the railroads. Seatrain further proved that where freight moved under joint rail and water rates, the established divisions of the railroads were fixed (and since have been fixed by the Commission) to cover the per diem expense of the railroads while holding or loading the freight in cars at the ports. For these reasons, Seatrain asserted that Per Diem Rule 15, if applied to water carriers, was unlawful, because if applied to water carriers, shippers would be deprived of the "free time" for which they paid the railroads. Accordingly, the tariffs and divisional arrangements would require special alteration in connection with Seatrain service, if the rule was to be applied without a violation of tariff provisions. As to this matter, after a lengthy analysis, the Commission, consistent with Seatrain's position, found that it would be preferable to not alter the tariffs and divisional arrangements but rather to require the defendants to cease and desist their efforts to force Seatrain's direct connection to apply Per Diem Rule 15 on Seatrain traffic as though Seatrain was a railroad.

---

* Cars returned empty to Seatrain are accepted when offered and Seatrain bears the per diem charge thereafter until such cars are delivered empty or loaded to one of its direct railroad connections.

As to the question whether Seatrain should pay per diem directly to car owners, Seatrain stated that it had no objection to making direct payments, provided the rules were so amended to permit direct payments, or provided Seatrain's direct connections would agree to amend their contracts with Seatrain with respect to the observance of car service rules so as to permit Seatrain to make direct payments.

The Commission in its findings stated as follows:

> "Defendants urge that Seatrain should be required to make report of its detention of cars directly to the owning lines and to make settlement of per diem charges directly with them instead of through complainants. Seatrain is willing to do this, but points out that apparently this method of settlement would require it to become a party to the car-service agreement in which the subscribing railroads have agreed to abide by the per diem rules. Since there is no difference of opinion as to the desirability of making direct settlement, no finding on this point appears to be necessary and the method of accomplishing the result will be left to the intervener, Association of American Railroads." (248 I. C. C. 109, 119-120).

With respect to these several contentions of these railroads, the United States Supreme Court stated as follows:

"The Commission found the $1.00 per car per day, to be paid to the car owners while Seatrain actually had cars in its possession, was a reasonable compensation. Although, in practice, cars brought to the ports must sometimes wait several days for Seatrain's sailing, the Commission did not require Seatrain to make per diem payments during this waiting period. It is contended that the Commission should require Seatrain to pay for the cars from the time they are made available to it; that the rate of compensation was too low; and that in both respects, the result is to require railroads to afford Seatrain the 'free use' of their property, thereby imposing a burden upon the railroads which Congress neither did nor could have authorized. *Chicago R. I. & P. Ry. Co.* v. *United States*, 284 U. S. 84, 97 (323 U. S. 612, 623).

"The questions thus raised depend upon a determination of facts. The findings of the Commission, discussed at length in its opinions, illustrate the complex nature of the facts involved. 237 I. C. C. 97, 101-102; 248 I. C. C. 109. Those facts need not be repeated here. The Commission not only had the benefit of the testimony offered in these proceedings, but was possessed of wide experience with the general problem of car hire. See e.g. Rules for Car Hire Settlement, 160 I. C. C. 369. We have carefully examined the record and find substantial evidentiary support for the Commission's finding 'that the current code of per diem rules governing the interchange of freight cars between the defendants above referred to and other rail carriers, including the current rate of $1.00 per day payable by Seatrain for such period as the cars are in its actual possession, would be reasonable for application to the interchange of cars between defendants and complainants for use by Seatrain.' 248 I. C. C. at 119. This being true we sustain the Commission's order in this respect.[14]

"We find no merit in any of the other contentions raised against the order of the Commission." (323 U. S. 612, 623-624).

> "[14]. It is to be noted that the Commission has not foreclosed future consideration of the car hire compensation problem, insofar as it may be involved in determining railroad rates or a proper division of through rail water rates between Seatrain and the railroads. 248 I. C. C. 117; cf. Chicago R. I. & P. Ry. Co., *supra*, 97, 109, note 11." (323 U. S. 612, 624).

Since the decision of the Supreme Court, none of the primary defendants nor the Seaboard, have in any way accepted or complied with the decision of the Commission and the findings of the Supreme Court with respect to these issues.

The complaint in Docket 31014 charges that all railroads that have applied and complied with these decisions, as aforesaid, are violating the law, because those decisions failed to adopt their contrary view with respect to these issues. The Association is not a party to the complaint in Docket 31014 but it is the final and authoritative agent for all railroad car owners in the United States. The great majority of these car owners have applied and complied with the findings as aforesaid. In the anti-trust proceeding, the Association representing all railroad car owners adopted as its own the position of the primary defendants therein with respect to these issues, a position directly contrary to the voluntary actions of the great majority of its member car owners and contrary to its own rules except Car Service Rule 4 and Per Diem Rule 15.

The Association has failed to suspend, modify, or cancel Car Service Rule 4, although it has the power to suspend, and its directors and staff have the duty to recommend to all railroad car owners changes in Car Service and Per Diem Rules which appear or have been found to be unreasonable, unlawful or otherwise undesirable. That the Association is fully cognizant of its failure to carry out its duties with respect to the unlawfulness of two of its Rules, as well as its inconsistent position with respect to the other rules, is shown in the report and legal review made by officials of the Association which is attached hereto as Exhibit J and which appears in the anti-trust proceeding as Exhibit 39.

The studies made by the Association and the actions taken with respect to the recent increase in the per diem rate, including the independent survey which the Association obtained in connection therewith, not only do not furnish but actually destroy any grounds for the allegation that the current per diem rate does not cover ownership cost.

Similarly, there has been no material change in the tariffs of the railroads with respect to time allowed shippers for holding or loading freight at the ports.

Exhibit J proves that car owners do not want Seatrain to make direct payments. There is nothing new now offered with respect to Seatrain use of empty cars for the loading of traffic originating at its ports, thereby controlling its empty movements by efficient sales and management practice.

Similar allegations were made by the complainants in Docket 31014 as to these issues to the Commission; to the District Court in Alexandria, Va. (*Alabama Great Southern R. Co.* v. *United States*, 103 F. Supp. 223), and the District Court at Trenton, N. J., in the anti-trust action. That those contentions were and are without foundation is depicted in the brief filed by Seatrain in *Alabama Great Southern R. Co.* v. *United States, supra,* which is contained in the Commission's records covering its defense of its Order in W-543 (Sub. No. 2) and by the Affidavit of Graham M. Brush in Opposition to Defendants' Motion to Dismiss the Complaint, dated April 12, 1952, which is a part of the record in the anti-trust proceeding heretofore furnished the Commission. Further discussions of the impropriety of those contentions is also found in the affidavit of Graham M. Brush, filed with the District Court in Trenton, N. J., on

March 14, 1952, in support of Seatrain's Application for Preliminary Injunction. The Federal Court in its decision, Exhibit A, referred to this Affidavit with respect to these particular issues, and mentioned the current position of Seatrain with respect to ownership of cars.

As stated heretofore, the Association is neither a complainant nor was it made a defendant in complaint—Docket 31014—although it is the Car Service and Per Diem Rules of the Association (other than Car Service Rule 4) which the complainants allege should be changed. The defendants are all the railroads which have voluntarily consented to the use of their cars by Seatrain in one or more of its routes and which have accepted and used for many years the Car Service and Per Diem Rules in connection with the use of their cars and the cars of others for the movement of freight via Seatrain, showing that the present rules are not unreasonable.

Under the terms of the Car Service and Per Diem Agreement, the sole power rests with the Board of Directors of the Association to initiate any changes, modifications, amendments, or cancellations of any Car Service or Per Diem rule. The head of the Car Service Division of the Association has sole power to suspend rules. If any party to the Car Service and Per Diem Agreement believes that the rules are in any way unreasonable, that party should seek rule changes in accordance with the agreement and if unsuccessful should file a complaint naming the Association as the defendant.

Furthermore, the Commission is not asked to exercise its authority with respect to the establishment of reasonable Car Service and Per Diem rules, vested in it under Section 1(14)(a). Under this Section, the Commission has authority to fix reasonable rules, including compensation, in connection with the use of any car by any "carrier" subject to Part I. Seatrain, like many other water carriers, including its coastwise competitors, is a carrier subject to Part I as well as Part III.

In its decision of October 13, 1941, 248 I. C. C. 109, the Commission pointed out that prior to its decision, many railroads had voluntarily consented to the use of their cars by Seatrain and had accepted the Car Service and Per Diem rules in connection therewith, and that such railroads were no longer defendants in that proceeding. The Commission further pointed out that nineteen of the remaining defendants in that case (most of the major railroads remaining as defendants), had voluntarily accepted and used the Car Service and Per Diem rules in connection with Seatrain's Cuban services. These statements were made by the Commission as further support for its findings that the Car Service and Per Diem rules (other than Car Service Rule 4 and Per Diem Rule 15) were reasonable in connection with the use of cars for Seatrain service. Since that decision, many of said remaining defendants have voluntarily consented to the use of their cars in Seatrain services without order of the Commission and have accepted and used the Car Service and Per Diem rules with respect to cars in Seatrain service.

At present, more than 90% of the railroad owned cars in the United States are *voluntarily* permitted to move by the car owners in one or more of Seatrain's services. At no time has the percentage been less than about 50%. *There are only three railroads* among all the United States railroads, which own any substantial number of cars that have not *voluntarily* consented to the use of their cars and *voluntarily* accepted the Car Service and Per Diem rules applicable in connection with cars moving via Seatrain on one route or another.

Those railroads are the Pennsylvania Railroad, including its controlled line, the Ann Arbor, The Seaboard and the Great Northern. The records further disclose that the acceptance of the Car Service and Per Diem Rules by all other roads has not been for short periods, or as a result of some order of the Commission, but for periods from ten to twenty-three years, with several minor exceptions. While approximately 90% of the railroad owned cars are now permitted to be used in connection with one or more of Seatrain's routes (by reason of the *voluntary* actions of the car owners), the percentage is much less for each individual route, the Savannah route being only slightly in excess of 50%.

These statistics might give the impression that there are a sufficient number of permitted cars for Seatrain to operate its various services so that the public may obtain the full advantage thereof. Such an impression would be wholly erroneous.

It is important to call attention to another fact—these *voluntary* consents may be withdrawn at any time. Hence, there is no stability with respect to the use of an essential facility by Seatrain. For twenty years Seatrain has been in constant danger of having that facility taken away, and until Seatrain and all the railroads with which it connects and with which it does business obtain the same rights to use cars in connection with Seatrain as are accorded to every other carrier in the United States, instability and uncertainty will remain. It is essential that a final determination with respect to the jurisdictional question as to cars be made.

In view of the above, Seatrain submits that the primary defendants in the anti-trust proceeding, together with the Seaboard, are abusing and have continuously abused the judicial processes by repeatedly injecting these matters into various proceedings and forcing Seatrain to defend constantly and repetitively the reasonableness of the Car

Service and Per Diem Rules (other than Car Service Rule 4 and Per Diem Rule 15). The records show that the aforesaid railroads in the past fourteen years have injected these matters into various proceedings before the Commission and the Federal Courts to the end that these matters have been reargued in briefs and oral arguments *eighteen* times. Furthermore, the record discloses that on two occasions, namely, November 17, 1941, and March 2, 1945 the Commission denied requests to reopen or review its findings that the Car Service and Per Diem Rules (other than Car Service Rule 4 and Per Diem Rule 15) were reasonable. Seatrain respectfully submits that complaint—Docket 31014—is nothing but another request upon the Commission to reopen and reconsider the same issues which it has refused to do in the past not only in denying the aforesaid petitions, but on other occasions when these issues were not pertinent to the proceeding but were injected therein by these several railroads. For example, see *Seatrain Lines, Inc., Temporary Authority Application, supra,* decided November 13, 1951.

There is nothing new in connection with the allegations made which would even remotely warrant "reexamination" of these car service issues. If there were, the proper proceeding would be a complaint naming the Association as defendant for maintaining unreasonable Car Service and Per Diem Rules.

Seatrain is seeking some effective means to put a stop to such tactics and is here asking the Commission for a Declaratory Order with respect to its jurisdiction to award reparations for damages which Seatrain has suffered as a result of such tactics, this being but another illustration of the complainants in Docket 31014 protracting and confusing proceedings by continuously injecting such issues therein.

Summary of the "Relief" Sought

The Complaint—Docket 31014—seeks at some unforeseeable future time *if* permanent authority should be granted to Seatrain to operate a service between New York and Savannah, to have the Commission (a) fix rates in connection with Seatrain's Gulf services, as well as its Savannah service, on a basis heretofore found unreasonable by the Commission and on a level which admittedly would put Seatrain out of business, (b) establish through routes in connection with Seatrain's Gulf services which are now established and have been in whole or in part established for years; and establish through routes for the Savannah service which are in large part now established, (c) fix the terms and conditions in connection with said through routes, which terms and conditions are already fixed in the tariffs of the carriers maintaining said through routes, (d) fix divisions of joint rates not yet in existence and revise divisions already agreed upon by Seatrain and the rail carriers maintaining joint rates with Seatrain on a basis which would accord either no revenue to Seatrain or so little it could not operate, (e) declare reasonable and lawful Car Service Rule 4 and Per Diem Rule 15, heretofore found to be unreasonable and unlawful by the Commission and the Supreme Court, (f) find unreasonable other Car Service and Per Diem Rules, which rules were found by the Commission and the Supreme Court not to be unreasonable in connection with Seatrain, (g) fix joint rail and water rates between Seatrain and the complainants coincidentally with the redetermination and refixing of these other matters, and (h) hold all issues pertaining to Seatrain in abeyance until and unless the aforesaid relief is granted.

Conclusions With Respect to Complaint—Docket 31014

For the reasons set forth above, it is apparent that the Complaint in Docket 31014 would not fulfill its stated purposes nor the purposes which the Federal Court was led to believe it might accomplish. Therefore, the problem of settling the many differences which are claimed to exist between Seatrain and its friendly connections, which include the great majority of railroads on the one hand, and the primary defendants in the anti-trust proceeding, as well as the Seaboard, and the Association on the other hand, would continue to remain unsolved. Seatrain believes that it has ample reasons to justify its seeking damages from the primary defendants in the anti-trust proceeding because they are using as a means to further their conspiracy, the bringing, the causing to be brought, and the carrying on of litigation in bad faith and without probable cause for the purpose and with the intent of injuring Seatrain by limiting its earnings, causing it to expend its resources in defending itself, and restricting and hampering its normal growth and development. This means of furthering their objectives has been deemed to be an unfair competitive practice by the Federal Court as shown in its decision, Exhibit A. This is but one method used by the primary defendants and the Seaboard, which is not prohibited by, declared to be unlawful in or even mentioned in any provision of the Interstate Commerce Act.

Complaint—Docket 31014—serves as an example of the means used by the complainants to keep issues vital to Seatrain in constant litigation and uncertainty.

Seatrain in this petition requests the Commission to issue a declaratory order stating whether it has authority to award reparations for damages incurred as a result of the actions of parties designed to injure Seatrain by keeping vital issues in continuous litigation. With respect to Complaint—Docket 31014, Seatrain stated to the Federal Court in an affidavit of its President, as follows:

> "It is further proof of the continued efforts of the defendants herein to keep the subject of car service in continuous litigation by any means or methods for the reasons which the defendants have clearly and repeatedly stated, namely, to stop the growth of Seatrain and to minimize its importance as a competitor with the all-rail routes not only between North Atlantic and Gulf ports but between Atlantic Seaboard ports and even on the Great Lakes, as shown in Exhibits 26, 28 and 30 annexed to my affidavit in support of application for preliminary injunction. The defendants have not denied this objective and could not deny it. Neither have they nor could they deny the finding of the Commission and the affirmation by the United States Supreme Court that the 'sole object of the Association of Railroads' rule was to prevent diversion of traffic from the railroads to Seatrain'."

Although the Commission is not asked in this petition to pass upon the question of the real purpose of the complainants in filing said complaint with the Federal Court, it has been shown that the complaint—Docket 31014, will not accomplish the purposes alleged to the Federal Court.

The filing of said complaint and the use to which it was put in Federal Court has created and caused uncertainties as to issues vital to Seatrain. It has adversely affected its Savannah operations. Seatrain suggests that the aforesaid facts and circumstances furnish substantial grounds for its allegation to the Federal Court that these several railroads filed the complaint with the Commission and the Federal Court in bad faith and for the purpose of injuring Seatrain. The filing of said complaint and the facts in connection therewith furnish another example of the tactics used by the complainants which Seatrain seeks to stop.

This example furnishes additional grounds for Seatrain seeking the declaratory order herein requested.

Request for Declaratory Orders

In the light of the matters hereinbefore discussed, there unquestionably exist uncertainties as to the tribunal to which Seatrain may properly direct its plea for the relief to which it clearly is entitled. The exercise of the discretionary power with which the Commission is invested by Section 5(d) of the Administrative Procedure Act will terminate existing controversies and remove current uncertainties.

Accordingly, it is respectfully prayed that the Commission use the powers vested in it under and by Section 5(d) of the Administrative Procedure Act and answer the following queries by declaratory orders "to terminate a controversy or remove uncertainty":

> I. Has the Interstate Commerce Commission the requisite authority, and if so under what specific provisions of the Interstate Commerce Act, to award reparation for damages resulting from the utilization of available administrative and court procedures, in bad faith or without probable cause, knowingly or recklessly misrepresenting facts therein and making misleading statements of facts therein, multiplying and protracting proceedings thereunder, in bad faith or without probable cause, not for the purpose of obtaining settlement of issues but with the intended effect of continuing and creating doubts and uncertainties, all for the purpose of preventing future diversion of all-rail traffic to Seatrain?
>
> II. Has the Interstate Commerce Commission the requisite authority, and if so under what specific provisions of the Interstate Commerce Act, to require railroads which do not participate in and maintain through routes with Seatrain to permit

interchange of their freight cars with Seatrain and permit the use of such freight cars in connection with transportation via Seatrain in interstate commerce?

Respectfully submitted,

Seatrain Lines, Inc.
15 Broad Street
New York 5, N. Y.

By S. S. Eisen
140 Cedar Street
New York 6, N. Y.
Its Attorney

December 10, 1952

Service

The foregoing document is Appendix B of Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit, before the Rendition of Judgment in the Court of Appeals, filed in the Supreme Court of the United States, October Term 1952, copies of which Writ of Certiorari have been served upon all parties of record in C-1188-51 *Seatrain Lines, Inc.* v. *Pennsylvania Railroad Company, et al.*

Dated at New York, New York, this
10 day of December, 1952.

S. S. Eisen

No.

DEC 11 1952
HAROLD B. WILLEY, Clerk

APPENDIX B

(2nd of 2 Volumes)

BEFORE THE

Interstate Commerce Commission

DOCKET NO. 31177

PETITION OF SEATRAIN LINES, INC. FOR THE ISSUANCE OF DECLARATORY ORDERS UNDER SECTION 5(d) OF ADMINISTRATIVE PROCEDURE ACT

Volume 2 of 2 Volumes

SEATRAIN LINES, INC.
15 Broad Street
New York 5, N. Y.

By: S. S. EISEN
140 Cedar Street
New York 6, N. Y.
Its Attorney

December 10, 1952

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(A) The complaint is not in fact a complaint upon which the Commission could proceed either now or in the foreseeable future to find "the definitive and over-all solution of

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these many interrelated problems" which are raised in the complaint, or of the many other outstanding issues which are omitted therefrom 28

(B) The prayers for relief with respect to matters pertaining to the use of cars are predicated on the Commission's having only limited authority with respect thereof and not on the basis of the unlimited authority which the complainants and the defendant Association asserted the Commission had in the anti-trust proceeding. Either the Commission or the Court has jurisdiction over cars belonging to railroads which do not have through routes with Seatrain. The prayers in the complaint relating to car service matters are, therefore, not relevant to the solution of the issues with respect to use of cars other than those owned by railroads participating in through routes with Seatrain 34

(C) The prayers in the complaint with respect to Seatrain's New York-New Orleans and New York-Texas City services and the allegations that these issues are now or have been for years in dispute between Seatrain "and the railroads" are neither consistent with nor supported by the facts 43

(D) Not a single untried issue is raised in the complaint. The basic and related issues have been adjudicated one or more times. The complaint is nothing more than a petition for the reversal of findings of the Commission and the Supreme Court 46

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Exhibit A

UNITED STATES DISTRICT COURT

For the District of New Jersey

C 1188-51

On Motions

Seatrain Lines, Inc.,
Plaintiff,

against

Pennsylvania Railroad Company, et al.,
Defendants.

Opinion of Forman, *Chief Judge*

(Filed October 23, 1952)

Appearances:

Jamieson and Walsh,
by Crawford Jamieson,
for the Plaintiff.

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Theodore S. Hope,
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George L. Haskins,
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Covington & Burling,
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Exhibit A

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by Duane E. Minard,
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Pitney, Hardin & Ward,
by Waldron M. Ward and
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W. R. C. Cocke,
of Counsel.

O'Mara, Schumann, Davis & Lynch,
by Joseph A. Davis,
for New York Central Railroad Co.

Dorr, Hand & Dawson,
by George W. Whittaker,
of Counsel.

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FORMAN, *Chief Judge*:

I

So much of the amended complaint filed by the plaintiff, Seatrain Lines, Inc. (hereinafter called Seatrain), as is essential to the present considerations, charges as follows:

In 1929 Overseas Railways, Inc. began to carry goods between the ports of New York and New Orleans, via Havana, Cuba. On December 31, 1931 Seatrain acquired its net assets and it was merged and consolidated with Seatrain on October 14, 1933. In October of 1932 Seatrain inaugurated its interstate service between the ports of New York and New Orleans, via Havana, Cuba. In or about June of 1940 it added a service between the ports of New York and Texas City, Texas and on November 30, 1951 it added a further service between the ports of New York and Savannah, Georgia.

Seatrain developed a special type of vessel for the carriage of frieght in railroad cars over the long distances in ocean routes. Each of the vessels used by Seatrain is so constructed that it can carry 100 railroad cars on four decks. Special equipment is provided to hoist those cars from adjacent tracks on the docks and move them bodily into the vessels. This procedure makes it unnecessary for goods carried to the ports in railroad cars to be unloaded from the cars and carried piecemeal into the vessels.

Seatrain maintains physical facilities for the interchange of freight cars at dockside at the Port of New York (Edgewater, New Jersey,) with the New York, Susquehanna and Western Railroad Company; at the Port of New Orleans (Belle Chasse, La.) with the New Orleans and Lower Coast Railroad Company; at Texas City, Texas, with the Southern Pacific Lines; Missouri Pacific Lines; Gulf, Colorado & Santa Fe; Missouri, Kansas & Texas;

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Fort Worth & Denver; Chicago, Rock Island & Pacific, and the Texas City Terminal Railroad; and at Savannah, Georgia, with the Central of Georgia Railway Company.

In May of 1942 all of Seatrain operations were suspended as a result of the requisition of its ships, then five in number, for use by the United States in World War II. On March 12, 1947, its vessels having been returned to it by the government and reconditioned, it assumed its coastwise freight services. Two additional vessels were built and placed in operation in the latter part of 1951.

There are 10 defendants who are common carriers by rail engaged in the transportation of commodities in interstate commerce within the United States, namely: Pennsylvania Railroad Company, Atlantic Coast Line Railroad Company, Louisville & Nashville Railroad Company, Baltimore and Ohio Railroad Company, Seaboard Air Line Railroad Company, St. Louis-San Francisco Railroad Company, New York Central Railroad Company and Erie Railroad Company.

Also named as defendants are seven unincorporated associations of railroad corporations alleged to be supported, maintained and utilized by railroads, including the defendant railroads. The defendant associations are: Association of American Railroads, Presidents' Traffic Conference-Eastern Railroads, Traffic Executive Association-Eastern Railroads, General Freight Traffic Committee-Eastern Railroads, Freight Traffic Committee-New England Territory Railroads, Freight Traffic Committee-Trunk Line Territory Railroads, and Freight Traffic Committee-Central Territory Railroads.

The first four defendants, Pennsylvania Railroad Company, Atlantic Coast Line Railroad Company, Louisville & Nashville Railroad Company and Southern Railway Company, are the primary defendants in a combination and conspiracy, together with other railroads and the defendant Association of American Railroads and the other defendant corporations. The remaining six railroads are secondary defendants, having been induced by the primary defendants to join in said combination and conspiracy.

Seatrain is a holder of a Certificate of Public Convenience and Necessity issued to it by the Interstate Commerce Commission authorizing continuance of its operations between the ports of New York, New Orleans and Texas City and the grant of temporary authority to operate between the ports of New York and Savannah, similarly issued on November 13, 1951.

Except for the suspension of its service in World War II, as aforesaid, Seatrain has been operating continuously since 1932 in competition with railroads for interstate freight traffic between areas tributary to the gulf ports and areas tributary to the Port of New York, and since November 30, 1951 has been in similar competition for such traffic between areas tributary to the Port of New York and the Port of Savannah.

Seatrain transports freight generally at lower rates than the railroads and by using Seatrain service shippers are saved packing and handling expenses necessarily incurred when freight is shipped over break-bulk routes. In addition, certain classes of bulk freight which cannot be handled in vessels of the usual type and which cannot bear all rail charges can be handled by Seatrain and thus markets are opened up for them which otherwise could not be reached.

The interstate commerce involved is primarily transportation of freight in loaded freight cars, principally conducted by common carriers by rail but Seatrain and certain railroad-owned or controlled water carriers (commonly known as "car ferries"), are, and have been, engaged therein.

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The goods shipped all-rail from points in the northeast to points in the south or southwest must be transported over the lines of more than one railroad since the lines of no one railroad extend into both these territories; such transportation is effected, successively, by the several railroads whose lines are involved, each utilizing its own personnel, tracks, right of way, motive power, and other fixed and movable equipment, other than freight cars, but the car itself in which the freight is originally loaded, which may be owned by the railroad on which the traffic originated, by some other railroad participating in the haul, or by some railroad not participating therein, is loaded for shipment at the point of origin and hauled from point of origin to point of destination over all the lines of railroad involved, without unloading or reloading enroute.

Mutual and reciprocal arrangements between railroads of the United States, including all of the defendant railroads, have existed for many years under which railroad-owned freight cars are loaded, hauled, and delivered in interchange without restriction between the various railroads and have been used in continuous haul over the various railroads of the United States regardless of railroad ownership of the freight cars and of the railroads participating in the haul.

By such arrangements and agreements each railroad foregoes for the benefit of other railroads its right to control the use of its own freight cars (within limitations imposed by the Interstate Commerce Commission) and thereby surrenders such competitive advantage as it would otherwise possess as the owner of freight cars and the arrangements amount to, in effect, unrestricted, reciprocal licensing by each railroad of all other railroads in interchanging the cars owned by one railroad and that each railroad thereby acquires competitive advantages which it would not have if it would not have participated in such arrangements and agreements, and as a group the railroads of the country thereby acquire competitive benefits which they would not have if it were not for such arrangements and agreements.

In implementation and furtherance of such arrangements and agreements the defendant Association of American Railroads, voluntarily organized by the railroads of the country to regulate and administer them, promulgated the "Car Service and Per Diem Agreement" providing for the loading, interchanging, routing, handling, etc., of cars in interstate commerce for their rental both by the railroads using such cars and the railroads which own the cars so used and for matters relating to payment therefor.

Water carriers are not eligible as subscribers to such car service and per diem agreement now in effect and cannot practically become subscribers if eligible since many of the rules are drawn so as to fit the operating conditions and methods of railroads and are not applicable in certain respects to the operation of water carriers.

The ability of Seatrain to compete depends upon the lower rates (under which it can operate at a profit) which it can offer to shippers, the lower cost of packaging, handling, etc., and the more expeditious service via Seatrain as compared with the conventional type of water carrier service. Such competitive factors enable shippers to reach markets in which they cannot otherwise sell, but shippers cannot prudently enter into sales and other commitments based upon such lower rates, etc., unless assured that Seatrain will not be prevented from rendering the service at such rates upon which such shippers have relied in pricing their goods, selecting their markets and making their sales and shipping commitments.

The amended complaint further alleges that the defendants and other rail carriers in the United States since 1932 have been and are engaged in a combination and conspiracy in restraint of interstate trade and commerce in the transportation of freight and loaded freight cars in violation of section 1 of the Sherman Act and have conspired to, and attempted to, monopolize and have monopolized such trade and commerce in violation of section 2 of the said Act with intent to drive Seatrain out of business as a competitor of railroads, including particularly the primary defendants, and pending accomplishment of such purpose, they intend to restrain and limit Seatrain's development and expansion as a competitor of railroads, thereby depriving shippers and potential shippers of the economic and other benefits inherent in Seatrain's service and preventing them from having access to markets in which they would have been able to sell their products if they could have taken advantage of the lower transportation costs, etc. of Seatrain's service.

As far back as 1932 the defendants, by their joint action with other railroads, added to the Code of Car Service Rules of the Association of American Railroads the following, known as Rule No. 4:

> "Cars of Railway ownership must not be delivered to a steamship, ferry or barge line for water transportation without permission of the owner filed with the Car Service Division."

This rule was directed specifically against Seatrain with the sole object of monopolizing traffic for the all-rail routes to the exclusion of Seatrain, and although the said rule in form is applicable to the railroad-owned or controlled freight car ferries it was not intended to restrict and in practice has not restricted the use and interchange by them of railroad-owned freight cars since no railroads have refused to permit delivery of their cars to such car ferries. Only Seatrain is thus affected.

None of the primary defendants has currently on file with the Car Service Division of the Association a consent under Car Service Rule 4 to the delivery of its cars to, or the use of its cars by, Seatrain. Other railroads acting in concert with them have likewise refused to consent, have from time to time withdrawn consents previously filed and have filed limited consents to Seatrain's use of their cars, and any or all of the railroads whose consents are so on file may at any time withdraw them. The purpose and effect of said Rule 4, as administered by the Association at the instance of the defendants, is and has been to deny to Seatrain the free use and interchange of cars.

Seatrain has been made the victim of a boycott with regard to the use of cars belonging to the primary defendants and such other parties as they from time to time could induce to deny such use to Seatrain. The Association has acted for all members of the conspiracy in furthering the boycott by imposing and encouraging embargoes against Seatrain and other activities. The boycott has been extended against Seatrain with regard to the voluntary establishment of through routes, joint rules, divisions, charges and allowances in connection with interchange and otherwise for handling freight which the participants in the boycott have remained free to enter and regulate, except where Seatrain was concerned. The shipment of goods via Seatrain has been obstructed in a number of ways enumerated, among which were the cancelling of arrangements for rail-water shipment from ports served or proposed to be served by Seatrain; misinforming shippers and potential shippers as to Seatrain's service to induce them to ship via its railroad competitors; placing spies in Seatrain's offices; publishing publicly and to shippers statements designed to indicate or emphasize the uncertainty of Seatrain's service and the economies inherent therein, when such uncertainty did not exist for the purpose of destroying confidence in shippers that they could safely

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enter into marketing arrangements to sell their products in reliance upon Seatrain's service.

As a direct result of the conspiracy Seatrain has been drawn into numerous lengthy proceedings before the Interstate Commerce Commission and the courts ever since its commencement of the operation of coastwise routes in competition with the railroads in 1932. The litigation has been fomented and maintained, needlessly and vexatiously, by the primary defendants and others in combination with them in order to make more complete the boycott and to drain Seatrain of its financial resources and the energies of its executive officers thereby to weaken Seatrain's operation and development.

The restraints imposed upon Seatrain's competition have caused it to suffer great damages in excess of the sum of $54,721,000 to the date of suit. They continue currently and will in the future cause it to be damaged heavily wherefor Seatrain claims treble damages against the primary defendants and an injunction restraining all of the defendants from the several conspiratorial activities enumerated in the complaint.

II

Seatrain has moved for a preliminary injunction to restrain the defendants Pennsylvania Railroad Company, Atlantic Coast Line Railroad Company, Louisville & Nashville Railroad Company, Southern Railway Company, Baltimore and Ohio Railroad Company, Seaboard Air Line Railroad Company, St. Louis-San Francisco Railroad Company, Erie Railroad Company, and Association of American Railroads from a continuance of the acts alleged in the amended complaint. Affidavits in support of the motion were filed by Graham M. Brush, President of Seatrain. Counter affidavits were filed in resistance to it and reply affidavits were submitted by plaintiff.

Motions to dismiss the amended complaint, principally because this court lacks jurisdiction over the subject matter because the matters complained of fall within the exclusive or primary jurisdiction of the Interstate Commerce Commission and because the suit cannot be sustained under section 16 of the Clayton Act, were filed by the Pennsylvania Railroad Company, Atlantic Coast Line Railroad Company, Southern Railway Company, Lehigh Valley Railroad Company, Baltimore and Ohio Railroad Company, Seaboard Air Line Railroad Company, New York Central Railroad Company, Erie Railroad Company and the Association of American Railroads. Affidavits and counter affidavits addressed to these motions have been filed.

Motions to dismiss the action on similar grounds as well as for invalid service were also made by the defendant railroad associations, namely, Presidents' Traffic Conference-Eastern Railroads, General Freight Traffic Committee-Eastern Railroads, Freight Traffic Committee-New England Railroads, Freight Traffic Committee-Trunk Line Territory Railroads, and Freight Traffic Committee-Central Territory Railroads.

Seatrain withdrew those of its prayers for relief which applied in respect of alleged subsidiary means which are largely dependent for their effectiveness upon the continued exclusion of Seatrain from access to the national freight car pool, eliminating from its complaint those prayers which relate to relief in respect to through routes, joint rates divisions, bills of lading, switching, bill credit and loss and damage claims, concededly rendering moot any prayer for injunctive relief against the six unincorporated defendant associations, other than the Association of American Railroads. The plaintiff consented to an order dismissing the action against these defendants without prejudice.

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The Louisville & Nashville Railroad Company moved to quash the summons, service and the return upon it and to dismiss the complaint, and argument on this motion was held in abeyance. The plaintiff has also assented to the dismissal of the complaint against the Delaware, Lacakawanna & Western Railroad Company, and the remaining defendant, St. Louis-San Francisco Railroad Company, has secured continuances of its time to plead to the complaint.

The pending respective motions for preliminary injunction and for dismissal of the amended complaint have been argued orally and on briefs, and the arguments made by any or all of the defendants have been treated as if made on behalf of each defendant.

III

The railroads of the country, pursuant to the direction of the Interstate Commerce Commission, have by mutual agreement and through their agency, the Association of American Railroads, constructed a scheme for the automatic interchange of freight cars and have adopted rules and regulations governing such interchange and compensation therefor. The latter are embodied in the Code of Car Service Rules, known as the Car Service Per Diem Agreement. It is published, administered and supervised by the Association.

Seatrain takes only one exception to these rules and insists before this court that it desires only to be integrated into the system so that it may have the same access to the national supply of freight cars as have the railroads.

Only Car Service Rule 4, which provides that railroad-owned freight cars shall not be delivered to water carriers without the consent of the car owners filed with the Car Service Division of the Association, offends Seatrain, for it asserts it is aimed at it to prevent its access to freight cars on the same level as railroads. Some railroads have filed such consents, but it is apparent that other railroads, including some of the defendants, have felt that in its capacity for the transportation of trains or freight cars on coast wise runs Seatrain looms as a substantial competitor to rail carriers now and has future potentialities of being even a greater threat. These railroads see that Seatrain's water facilities permit the transportation of cars at cheaper costs than the railroads incur, enabling Seatrain to offer its services at rates more favorable to the shipper than those of the railroads. They also assert that Seatrain should not be entitled to uncontrolled access to freight cars on the same basis as rail carriers because it is not, indeed, a rail carrier. It owns no freight cars which could be the subject of interchange.

Seatrain points out that there are railroad carriers which, too, do not own freight cars and that in any event it would be willing to purchase and maintain cars.[1]

Seatrain declares that the device of Car Service Rule 4 and its administration by the Association constitute the main mechanism whereby the railroads operate to thwart it of access to freight cars. It also alleges that incidental to it the primary defendants and others and the Association activate themselves in a number of ways, which amount to a boycott of Seatrain as far as delivery to it and use by it of freight cars are concerned; these activities have been given added impetus anticipatory to and since the inauguration of its Port of New York to Savannah service in November of 1951. Some of these activities are manifest in the publication, coincidental as to time and verbiage, of embargoes against the movement of freight in Seatrain service; publication of tariff provisions denying the existence of through routes with Seatrain; taking advantage of the technicality in the change by Seatrain of its Port of New York Terminal from Hoboken to Edgewater, when it resumed service in 1947, on the ground that consents which had been given subsequent to the 1945 decision of the Supreme Court in *United States* v. *Pennsylvania R. Co.,* 323 U. S. 612, were valid only as to Hoboken, named as the terminal in the Commission's order, and are not binding as to Edgewater, the terminal substituted since the Commission's order; and a new and extended interpretation of Car Service Rule 4 by the Association prohibiting not merely delivery of cars to Seatrain but their use in any way in connection with Seatrain's service. By this design and intimations to shippers that Seatrain could not effectively carry on its service, made by some of the defendants, shippers, according to Seatrain, were intimidated from dealing with it. All of these activities Seatrain holds constitute a combined effort to restrict Seatrain from carrying on its business to its great damage and that of the public and its sole remedy therefor is under the provisions of the anti-trust laws. Seatrain avers that the combination must be enjoined unless it is opened up so that the benefits of the collective action are made available to Seatrain as well as to the railroads.

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[1] See affidavit of Mr. Graham M. Brush, President of Seatrain Lines, Inc., dated April 12, 1952.

Absent the jurisdiction and power of the Interstate Commerce Commission to direct the railroads to give Seatrain access to freight cars except where through routes with Seatrain in interstate commerce are concerned, Seatrain argues that the combination is a simple breach of the antitrust laws for which it is entitled to relief by way of injunction and damages under such decisions of the United States Supreme Court as *United States* v. *Terminal Railroad Association of St. Louis,* 224 U. S. 383 (1912); *Standard Oil Co.* (*Indiana*) v. *United States,* 283 U. S. 163 (1931); *Georgia* v. *Pennsylvania R. Co.,* 324 U. S. 439 (1945) and *Associated Press* v. *United States,* 326 U. S. 1 (1945).

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Seatrain leans heavily on the case of *Georgia* v. *Pennsylvania R. Co., supra,* which it claims precisely covers its allegations in this case. There the State of Georgia charged in its complaint in essence that the defendant railroads had entered into a conspiracy in restraint of trade and commerce among the states to fix arbitrary and noncompetitive rates and charges for transportation of frieght by railroad to and from Georgia so as to prefer the ports of other states over the ports of Georgia. It alleged that the defendants utilized boards, committees, conferences, associations and other private rate fixing agencies to fix the rates charged and no road could charge joint through rates without the approval of these private agencies and that private rate fixing machinery not sanctioned by the Interstate Commerce Act and prohibited by the antitrust laws had put effective control of rates to and from Georgia in the hands of the defendants; that the defendants who have lines wholly or principally in the South are generally dominated and coerced by the defendants who have northern roads so that even when the southern defendants desired they could not publish joint through rates between Georgia and the north when the northern carriers refused to join in such rates, the result of such practices in purpose and effect giving manufacturers, sellers and other shippers in the north an advantage over manufacturers, shippers and others in Georgia. The rates so fixed were allegedly approximately 39% higher than the rates and charges for transportation of like commodities for like distances between points in the north. It sued for damages and for injunctive relief.

The court held that the state was not entitled to recover damages, but that the injunctive relief sought by the state against the alleged rate fixing combination and conspiracy among the defendant carriers is not a matter over which the Interstate Commerce Commission had jurisdiction and that the relief sought was not such as is available under § 16 of the Clayton Act only in a suit brought by the United States.[2] The Supreme Court granted permission to file the complaint.

The plaintiff herein insists that its situation is on all-fours with that of the State of Georgia. It says that its complaint discloses that the defendants have arranged an apparatus by way of a private agency, namely, the Association of American Railroads, and the processes of filing consents by railroads for the use of their freight cars pursuant to Car Service Rule 4, which is entirely analogous to the rate fixing machinery set up in the Georgia case.

The reasoning of the Supreme Court in the *Georgia* case was that the complaint stated a cause of action because it could be construed as charging a conspiracy among the defendants to use coercion in the fixing of rates and to discriminate against Georgia in the rates which were fixed; that damages must be presumed to flow from a conspiracy to manipulate rates within that zone of reasonableness (between maxima and minima) within which a carrier is ordinarily free to adjust its charges for itself within that zone and the Commission lacks power to grant relief even though the rates are raised to the maxima by the employment of unlawful conspiratorial tactics. The Court held that:

> "The present bill does not seek to have the Court act in the place of the Commission. It seeks to remove from the field of rate-making the influences of a combination which exceeds the limits of collaboration authorized for the fixing of joint through rates. It seeks to put an end to discriminatory and coercive practices. The aim is to make it possible

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[2] Subsequent to the decision in this case, in 1948, Congress enacted legislation authorizing the conference method of rate making subject to the approval of the Commission, 49 U. S. C. § 5b.

> for individual carriers to perform their duty under the Act, so that whatever tariffs may be continued in effect or superseded by new ones may be tariffs which are free from the restrictive, discriminatory, and coercive influences of the combination. That is not to undercut or impair the primary jurisdiction of the Commission over rates. It is to free the rate-making function of the influences of a conspiracy over which the Commission has no authority but which if proven to exist can only hinder the Commission in the tasks with which it is confronted." 324 U. S. at pp. 459-460.

The court cautioned that it was dealing with the case only in a preliminary manner but assuming that the alleged combination could be shown to exist it held

> ". . . coercion can be enjoined. And so can a combination which has as its purpose an invidious discrimination against a region or locality. Dissolution of illegal combinations or a restriction of their conduct to lawful channels is a conventional form of relief accorded in anti-trust suits. No more is envisaged here. If the alleged combination is shown to exist, the decree which can be entered will be no idle or futile gesture. It will restore that degree of competition envisaged by Congress when it enacted the Interstate Commerce Act. It will eliminate from rate-making the collusive practices which the anti-trust laws condemn and which are not sanctioned by the Interstate Commerce Act. It will supply an effective remedy without which there can be only an endless effort to rectify the continuous injury inflicted by the unlawful combination. And no adequate or effective remedy other than this suit is suggested which Georgia can employ to

> eliminate from rate-making the influences of the unlawful conspiracy alleged to exist here." 324 U. S. at p. 462.

The ruling of the Supreme Court in the *Georgia* case can only govern this case if, here as there, the relief sought is not a matter subject to the jurisdiction of the Commission.

Seatrain has engaged in many controversies before the Interstate Commerce Commission and in the review of five of its decisions before the courts.[3] Seatrain views

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[3] Except for the period of World War II and thereafter (1942 to 1947), when it was in the government's hands, Seatrain has been involved in proceedings before the Interstate Commerce Commission and the courts since its service was initiated 20 years ago, until the number of such actions total fourteen.

They are listed in the pending petition of The *Alabama Great Southern Railroad Company, et al.*, v. *Seatrain Lines, Inc., et al.*, before the Interstate Commerce Commission, Docket No. 31014, as follows:

(1) New Orleans and Havana Car Ferry Service, No. 24119, 188 I. C. C. 371 (1932)—Application of Florida East Coast Railway Company for permission to operate FEC Car Ferry Company service between New Orleans and Havana; opposed by Seatrain.

(2) Participation of Seatrain Lines in Classification, I & S 3834, 194 I. C. C. 309 (1933)—Elimination of Seatrain as participating carrier in Southern Classification.

(3) Investigation of Seatrain Lines, Inc., No. 25565, 195 I. C. C. 215 (1933); 206 I. C. C. 328 (1935)—Investigation on Commission's own motion into status of Seatrain.

(4) Application of Missouri-Pacific Railroad Company *et al.*, No. 25546, 206 I. C. C. 328 (1935); 245 I. C. C. 143 (1941)—Application of Missouri Pacific Railroad Company and The Texas and Pacific Railway Company under Panama Canal Act to determine lawfulness of their stock interest in Seatrain.

(5) *Hoboken Manufacturers Railroad Company* v. *Abilene & S. Rwy. Co.*, Nos. 25728 and 25878, 206 I. C. C. 328 (1935); 237 I. C. C. 97 (1940); 248 I. C. C. 109 (1941); 55 F. Supp. 473; 323 U. S. 612—Car interchange.

(6) *Seatrain Lines, Inc.* v. *Akron, C. & Y. Ry. Co.*, No. 25727, 226 I. C. C. 7 (1938); 243 I. C. C. 199 (1940); 259 I. C. C. 297 (1944)—Through routes and joint rates. The reports in these proceedings also cover: No. 27445, *Agwilines* v. *Seatrain;* No. 27011, *Gulf Refining Co.* v. *Central R. R. of New Jersey;* I & S No. 4542, Class Rates via Seatrain.

(7) *Hoboken Manufacturers Railroad Company* v. *Akron O. & Y. Ry. Co.*, No. 27630, 234 I. C. C. 114 (1939); 47 F. Supp. 779; 320 U. S. 368—Divisions between Hoboken Manufacturers Railroad Company, Seatrain's subsidiary, and the railroads.

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as futile any further appeal to the Commission since it has repeatedly determined that its jurisdiction to compel access to freight cars is limited to through routes between rail and water carriers established pursuant to its order or voluntarily. In *Investigation of Seatrain Lines, Inc.*, 206 I. C. C. 328 (1935) Seatrain asserts that it urged upon the Commission that the provisions of §§ 1(4), 1(10 to 17), 3(4), 7 and 15(3) of the Interstate Commerce Act [49 U. S. C. §§ 1(4), 1(10 to 17), 3(4), 7 and 15(3)], conferred upon the Commission jurisdiction to require interchange with Seatrain independently of the through route provisions and that defendants in this case who appeared before the Commission in it and in other proceedings before the Commission and the courts insisted that the Commission was without jurisdiction to require such interchange under those provisions, with which contention the Commission agreed, saying:

> "It is our view that we have jurisdiction to require the establishment of through routes between

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(8) Seatrain Lines, Inc., Common Carrier Application W-543, 250 I. C. C. 816 (1942); 260 I. C. C. 430 (1945); 64 F. Supp. 156; 329 U. S. 424—Modification of Seatrain certificates.

(9) *West India Fruit & Steamship Co.* v. *Seatrain Lines*, 170 F. 2d 775—Rate-cutting from New Orleans to Havana.

(10) Seatrain Lines, Inc., Application for Temporary Authority, No. W-543 (Sub. No. 2), decided Nov. 13, 1951; injunction denied and complaint dismissed, Jan. 9, 1952. *The Alabama Great Southern R. R. Co.* v. *United States* (U. S. D. C. for E. D. Va.)—Savannah application.

(11) Class Rate Investigation, 1939, No. 28300—Ocean-rail rate phase of general investigation pending. Examiner's proposed report issued.

(12) Pan-Atlantic Steamship Corp., Extension-Houston, W-376 (Sub. No. 10), decided Aug. 9, 1951—Pan-Atlantic authority into Houston, opposed by Seatrain. Review proceedings of Commission's order pending before U. S. District Court for Southern District of New York; Seatrain intervening.

(13) Routing Restrictions via Seatrain Lines, Inc., I & S No. 5979, C-30594—Pending, suspension and investigations of announcements of absence of through routes with Seatrain.

(14) Seatrain Lines, Inc., Application for permanent authority, No. W-543 (Sub. No. 3)—Savannah operations—Hearings assigned.

> rail and water carriers, and, where such routes are established pursuant to our order or voluntarily, to require the interchange of cars between the rail and water carriers, and to require that equality of treatment provided by section 3(3) between connecting carriers, whether rail or water, in the facilities for the interchange of traffic, including through routes and the interchange of cars. We find nothing in the act imposing any duty upon or giving us jurisdiction to require a rail carrier to permit delivery of its cars to a water carrier where through routes between such rail and water carriers do not exist." 206 I. C. C. at p. 343.

Seatrain points out that the Commission specifically held that it was not empowered under Section 7 to require interchange with Seatrain except in the case of through routes as aforesaid, although it had in mind Car Service Rule 4. (See pp. 343-344 and 337-338). And again in its decision in *Seatrain Lines, Inc.* v. *Akron, Canton & Youngstown Railway Co., et al.*, 226 I. C. C. 7, the Commission expressly stated:

> "We have found that we are without jurisdiction to require a rail carrier, in the absence of through routes, to deliver its cars to a water carrier. While it is the duty of a rail carrier to furnish cars upon reasonable request therefore, we may not, in the absence of through routes, require it to furnish cars that are to be delivered to a water carrier contrary to the express directions of the owners of the cars . . ." 226 I. C. C. at p. 30.

Seatrain further shows that in 1941 in the case of *Hoboken Manufacturers Railway Co.* v. *Abilene & Southern Railway Co., et al.*, 248 I. C. C. 109, the defendants in this case who appeared there reiterated their contention that the Commission was without any power to require them to permit use of their cars by Seatrain and the Commission maintained its position that it had such power but only where through routes had been established between rail and water carriers to require the interchange of cars between them (p. 110). This decision of the Interstate Commerce Commission was reviewed by a three-judge court of this district, which is reported in *Pennsylvania R. Co.* v. *United States,* 55 F. Supp. 473 (1943), which was in turn appealed to the United States Supreme Court, and its decision is found in *United States* v. *Pennsylvania R. Co.,* 323 U. S. 612 (1945). Seatrain interprets the decision of the United States Supreme Court as not effecting the holding of the Interstate Commerce Commission that it had jurisdiction to require a railroad to permit interchange of its cars with Seatrain only where such cars were used over an interstate through route between such railroads and Seatrain.

The Court referred to the division of the 1940 Transportation Act into three parts, the first relating to railroads, the second to motor vehicles and the third to water carriers, and noted that:

> "The interrelationship of the three parts of the Act was made manifest by its declaration of a 'national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act, so administered as to recognize and preserve the inherent advantages of each.' The declared objective was that of 'developing, coordinating and preserving a national transportation system by water, highway, and rail . . . adequate to meet the needs of the commerce of the United States . . .' Congress further admonished that 'all of the provisions

> of this Act shall be administered and enforced with a view to carrying out the above declaration of policy" (pp. 616-617).

The policy is then applied by the Court to the specifics of Seatrain's problem of interchange in the following language:

> "This policy cannot be carried out as to Seatrain's interstate carriage unless railroads interchange their cars with it. The particular type of service introduced by Seatrain, and found by the Commission to be qualitatively superior, cannot be rendered without the privilege of carrying the very railroad cars which carry freight to its ports. The 'inherent advantage of this service' would be lost to the public without railroad car interchange.
>
> "Furthermore, the Act calls for 'fair and impartial regulation.' The railroad Association's rule however is constructed on the premise that the railroads can at their discretion determine which water carrier may, and which may not transport their cars. Seatrain alone, of all the water carriers, according to the Commission's findings, has been refused car interchange. This means that the Association's rule, if valid, enables the railroads to decline to deal with Seatrain as it does with other carriers. As early as 1914, the Commission had declared that the Interstate Commerce Act, as then in effect, prohibited railroad practices which lent themselves to such purpose. The Commission said at that time:
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> " 'If the rail carriers are permitted to choose the particular boat lines with which they will establish through routes and joint rates, they will be able to dictate who shall operate on the water and

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who shall not, for a boat line which is accorded a monopoly of the through rail-and-water traffic will soon be able to drive its competitors out of business.' Pacific Navigation Co. v. Southern Pacific Co., 31 I. C. C. 472, 479.

"We cannot agree with the contention that the Commission has less power now to protect water carriers than it had in 1914. The 1940 Act was intended, together with the old law, to provide a completely integrated interstate regulatory system over the motor, railroad, and water carriers. In the light of its declared policy, and because of its provisions hereafter noted, we think railroads are under a duty to provide interchange of cars with water carriers to the end that interstate commerce may move without interruption or delay. Cf. Flour City S. S. Co. v. Lehigh Valley R. Co., 24 I. C. C. 179, 184. (pp. 617-619)

The Court then cited sections 1(4), 3(4) and 15 (3) of Part I of the Interstate Commerce Act[4] as sufficient au-

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[4] It is provided by § 1(4) of the Interstate Commerce Act [49 U. S. C. § 1(4)] that it shall be the duty of common carriers by railroad to establish reasonable through routes with carriers by water, and just and reasonable rates, fares charges and applications applicable thereto. It is furthere provided that it shall be the duty of every common carrier establishing through routes to provide reasonable facilities for operating such routes and to make reasonable rules and regulations with respect to their operation and provide for reasonable compensation to those entitled thereto and in the case of joint rates, fares, or charges, to establish just, reasonable and equitable divisions thereof, which shall not unduly prefer or prejudice any of such participating carriers.

By § 1(10) [49 U. S. C. § 1(10)] the term "car service" includes the use, control, supply, movement, distribution, exchange, interchange and return of locomotives, cars, and other vehicles used in the transportation of property by any carrier by railroad.

By § 1(13) [49 U. S. C. § 1(13)] the Commission is empowered to require all carriers by railroad to file with it from time to time their rules and regulations with respect to car service and the Commission may, in its discretion, direct that such rules and regulations shall be incorporated in their schedules showing rates, etc.

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thorization for the Commission's order in that case and concluded:

By § 1(14)(a) [49 U. S. C. § 1 (14)(a)] the Commission may, after hearing on a complaint or upon its own initiative, establish reasonable rules and regulations and practices with respect to car service by common carriers by railroad including the compensation to be paid and other terms by agreement or arrangement for the use of any car or other vehicle not owned by the carrier using it (and whether or not owned by another carrier).

By § 3(4) [49 U. S. C. § 3(4)] it is provided that all rail carriers, according to their respective powers, shall afford all reasonable and equal facilities for the interchange of traffic between their respective lines and connecting lines and shall not discriminate in their rates between connecting lines or unduly prejudice any connecting line in the distribution of traffic that is not specifically routed by the shipper. The term "connecting line" is specifically defined as including any common carrier by water.

By § 7 [49 U. S. C. § 7] it is provided that it shall be unlawful for any common carrier to "enter into any combination, contract or agreement, expressed or implied to prevent, by change of time schedule, carriage in different cars, or by other means or devises, the carriage of freights from being continuous from the place of shipment to the place of destination; and no break of bulk, stoppage, or interruption made by such common carrier shall prevent the carriage of freights from being and being treated as one continuous carriage from the place of shipment to the place of destination, unless such break, stoppage, or interruption was made in good faith for some necessary purpose, and without any intent to avoid or unnecessarily interrupt such continuous carriage or to evade any of the provisions of this part."

By § 15(3) [49 U. S. C. § 15(3)] it is provided that the Commission may, after full hearing upon complaint or upon its own initiative "establish through routes, joint classifications, joint rates, fares or charges applicable to the transportation of passengers or property by carriers * * * by railroad * * * and common carriers by water subject to part III, or the maxima or minima, or maxima and minima, to be charged, and the divisions of such rates * * * and the terms and conditions under which such through routes shall be operated * * *"

"By § 305(b) [49 U. S. C. § 905(b)] it shall be the duty of common carriers by water to reciprocally establish reasonable through routes with other such carriers and with common carriers by railroad and rates and classifications applicable thereto to provide reasonable facilities for operating such through routes and to make reasonable rules and regulations with respect to their operation and providing for reasonable compensation to those entitled thereto.

There are a number of other provisions of the Interstate Commerce Act that are relevant to the relationships between carriers by rail and water carriers such as Seatrain, or that implement those above set forth. A historical analysis of the provisions of the Interstate Commerce Act and later amendments which impose specific duties as to car interchange are detailed in the case of *Pennsylvania R. Co.* v. *United States*, 55 F. Supp. 473, at pages 479-483 and summarized in footnote 5 in the Supreme Court opinion in the same case, 323 U. S. 612, at page 618.

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> "It was from its power to require through routes that the Commission originally derived its power to require interchange of railroad cars among connecting railroads. Since a rail-water through route with Seatrain cannot function without an interchange of cars, the unquestioned power of the Commission to require establishment of such routes would be wholly fruitless, without the correlative power to abrogate the Association's rule which prohibits the interchange" (p. 619).

In the spirit of this interpretation of the national transportation policy it appears that the Interstate Commerce Commission has the jurisdiction and the power to direct such conditions of interchange that will integrate Seatrain into the national transportation system as envisaged by the National Transportation Act of 1940 to the maximum use of its service and facilities subject, of course, to the standard of public necessity and convenience. It may determine and direct through routes with Seatrain as it, indeed, had done heretofore and if in the proper development of those through routes interchange of and access to cars, even though not owned by railroads participating in such through routes are required, it may make appropriate directions. To this end if the suspension of Car Service Rule 4 of the Association is required, the Commission must have the power to do so.

Obviously the many considerations that enter into the task of determining the character of such interchange are not for the courts, but for the expert judgment of the Interstate Commerce Commission.

Therefore I find a definite distinction between this case and *Georgia* v. *Pennsylvania R. Co., supra.* In that case there is the naked combination to force the fixing of rates within a "zone of reasonableness" the existence of which

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combination the Supreme Court held was within the jurisdiction of a court to determine under the antitrust laws. In this case the inquiry concerns itself with agreements and arrangements recognized as valid by, or subject to change at the direction of, the Commission. The suggestion of Seatrain that the complicated net work of them should be enjoined pending its admission to their benefits is not impressive for that would not benefit Seatrain and would prove chaotic to the industry that is the nation's very circulatory system. Rather, it must be determined whether or not they should be pried open to admit Seatrain and under what conditions. Surely this is for the Interstate Commerce Commission to probe with all its sharp instruments of experience and expert resource. *Keogh* v. *Chicago & N. W. Ry. Co.*, 260 U. S. 156 (1922); *U. S. Navigation Co.* v. *Cunard S. S. Co.*, 284 U. S. 474 (1932); *Central Transfer Co.* v. *Terminal R. R. Assn.*, 288 U. S. 469 (1933) and *Terminal Warehouse* v. *Pennsylvania R. Co.*, 297 U. S. 500 (1936).

It is true that the Interstate Commerce Commission has announced a limitation upon its power to direct the interchange and use of railroad cars to Seatrain, as in *Investigation of Seatrain Lines, Inc.*, 206 I. C. C. 328, and that it has also made definitive rulings governing conditions under which the cars were to be used, *Hoboken Manufacturers Railroad Company* v. *Abilene & S. Railway Company,* 248 I. C. C. 109. It is likewise true that Seatrain has made no application to the Commission for a more general use of cars since the decision of the United States Supreme Court in *United States* v. *Pennsylvania R. Co., supra,* in 1945. The pronouncements of the Commission heretofore made are not so final but that in the light of the latter decision it could re-examine them under its continuing jurisdiction over its orders pursuant to the

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provisions of section 16(6) and 17(6), 49 U. S. C. §16(6)[5] and § 17(6).[6]

Seatrain rests in no better case in its application of § 16 of the Clayton Act, 15 U. S. C. § 26, to its prayer for injunctive relief against the defendants. True, injunctive relief under the Clayton Act is not denied to private persons and confined only to the United States. But the Act specifically provides that

> ". . . nothing contained in sections 12, 13, 14-21, 22-27 of this title shall be construed to entitle any person, firm, corporation, or association, except the United States, to bring suit in equity for injunctive relief against any common carrier subject to the provisions of chapters 1 and 8 of Title 49, in respect of any matter subject to the regulation, supervision, or other jurisdiction of the Interstate Commerce Commission."

Seatrain contends that as in the decision of the Supreme Court in the case of *Georgia* v. *Pennsylvania R. Co., supra,* it is seeking only injunctive relief against the combination of which it complains and that this is not "in respect of any matter subject to the regulations, jurisdiction or other supervision of the Interstate Commerce Commission." Surely Seatrain cannot maintain that it merely seeks to remove a combination and conspiracy designed to influence each railroad to deny access to its cars

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[5] Section 16(6). [49 U. S. C. § 16(6)]. "The Commission shall be authorized to suspend or modify its orders upon such notice and in such manner as it shall deem proper."

[6] Section 17(6). [49 U. S. C. § 17(6)]. "After a decision, order or requirement, shall have been made by the Commission, a division, an individual Commissioner, or a board, or after an order recommended by an individual Commissioner or a board shall have become the order of the Commission as provided in paragraph (5), any party thereto may at any time, subject to such limitations as may be established by the Commission as hereinafter authorized, make application for rehearing, reargument, or reconsideration of the same, or of any matter determined therein. Such applications shall be governed by such general rules as the Commission may establish * * *"

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to Seatrain without more and that its attack upon Car Service Rule 4 is only to the extent that it has been used as a means of such a combination or conspiracy, Seatrain's position must be that no railroad has the right to deny to it such access if it permits the use of its cars by railroads. I cannot agree that any distinction arises between the obstacle Seatrain faces in the proviso of section 16 of the Clayton Act and the barrier with which it is confronted by the doctrine of primary jurisdiction. Under the considerations heretofore expressed not only has the Interstate Commerce Commission jurisdiction to grant it relief from its alleged complaints but that relief cannot be afforded except as the Commission finds that it is justified and if so under what terms and conditions it is to be regulated and administered.

When the Supreme Court in *Georgia* v. *Pennsylvania R. Co., supra,* distinguished that case from the case of *Central Transfer Co.* v. *Terminal Ry. Association,* 288 U. S. 469 (1933) it did not aid Seatrain over the hurdle of the proviso in section 16 of the Clayton Act for Seatrain is not in the position of the State of Georgia. The Court in the *Georgia* case also adhered to its decision in *Terminal Warehouse* v. *Pennsylvania R. Co.,* 297 U. S. 500, when it said:

> "If a sufferer from the discriminatory acts of carriers by rail or by water may sue for an injunction under the Clayton Act without resort in the first instance to the regulatory commission, the unity of the system of regulation breaks down beyond repair" (p. 513).

Unlike Georgia, Seatrain is not faced with only an agreement or combination outside the jurisdiction of the Commission. In Seatrain's case the agreements which it claims offend it do so in only one way, that is, excluding it from their scope. The right to be included in those arrangements and the conditions surrounding such inclusion is a subject within "the regulation, jurisdiction or other supervision of the Commission."

Nor is the decision of this court in the case of *Slick Airways, Inc.* v. *American Airlines, Inc., et al.,* C 317-50 (opinion on rehearing, filed August 18, 1952) inconsistent with the position assumed in this case. There the regulatory statute was the Civil Aeronautics Act under which the Civil Aeronautics Board was without power to provide remedial relief for past injuries resulting to a victim of a conspiracy. In that case the conspiratorial acts and the combination which were akin to those described in *Georgia R. Co., supra,* were held to be within the jurisdiction of the court.

The subsidiary charges made by Seatrain as to unfair competitive practices upon the part of the defendants are incidental to the main allegations of the complaint that the defendants have conspired to deny to Seatrain interchange and use of freight cars owned by railroads. They must follow the major charge as being within the jurisdiction of the Commission.

Neither can this court maintain jurisdiction over the suit in so far as it claims treble damages from the primary defendants under the holding herein that the complaint charges acts cognizable under the primary jurisdiction of the Commission which are remediable under its reparation power. *Keogh* v. *Chicago & N. W. Ry.,* 260 U. S. 156 (1922); *Terminal Warehouse Co.* v. *Pennsylvania R. Co.,* 297 U. S. 500 (1936); *Georgia* v. *Pennsylvania R. Co.,* 324 U. S. 439 (1945).

The heart of the controversy raised here revolves around the question of whether Seatrain shall have access to the freight cars of the railroads. A number of side issues have been introduced into the argument which are moot questions and help but little toward a solution of the problem. For instance, Pennsylvania Railroad Company, one of the primary defendants, insists that it is not a through route carrier with Seatrain although such a status was ordered for it by the Commission. This, however, was when Seatrain's Port of New York Terminal was at Hoboken. Since Seatrain substituted Edgewater for Hoboken in 1947 Pennsylvania considers itself not bound by an order designating Hoboken as a terminal but certainly the status of Pennsylvania as a through route carrier as it might have been affected by the substitution of Edgewater for Hoboken was a matter for definitive action by the Commission. Again, it is argued that in 1942 when the vessels of Seatrain were requisitioned by the War Shipping Administration the Commission itself recognized its authority to deal with the question of interchange between rail and water carriers unrestrictedly as to through routes. On May 22, 1942, the Commission issued its Service Order No. 75 in which it suspended Car Service Rule 4 in so far as it applied to the delivery of railroad cars to water carriers controlled or operated by or for the account of the War Shipping Administration. Shortly after the close of hostilities in August of 1945, the order was vacated and Rule 4 was restored. Seatrain contends that it was purely an exercise of emergency power under Section 1(15) of the Act and not evidence that the Commission had changed its "original limited view of its authority" as urged by the defendants. Seatrain's theory of what was behind the Commission's action is probably more accurate but the speculation is fruitless in resolving the vital issue in the case. Many other such "side" issues are explored by the parties but analysis and recital of them here would add nothing to this decision.

It is indeed regrettable that Seatrain should have been exposed to such time consuming procedures in airing its problems administratively and in the courts. Concededly, they involve intricate and delicate mechanisms functioning in a highly complicated area of industry and commerce.

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Perhaps the circumstances attendant upon the innovation of transportation of loaded freight cars in the manner of the Seatrain system and the interruption of the war years permitted no greater progress to the solution of the problems involved.

However, it would now appear that although some of the defendant railroads have for many years resisted the efforts of Seatrain to gain access to freight cars and have gainsaid the power of the Interstate Commerce Commission to direct it, certain of them including the primary defendants in this case, and others, filed a complaint with the Commission, on March 26, 1952, entitled *The Alabama Great Southern Railroad Company, et al.* v. *Seatrain Lines, Inc., et al.,* Docket No. 31014. In it they state that they seek

> ". . . a complete and authoritative determination of all of the problems involving Seatrain's relationship to the national transportation system, which would establish under the Commission's supervision a stable and proper relationship.
>
> "The complainant railroads have accordingly concluded that the time has come when there ought to be a definitive and over-all solution of these many inter-related problems. It is insufficient, for a long-term solution, merely to establish that the court has neither jurisdiction nor authority to contrive this solution, nor should the railroads continue to await the piecemeal solution of the problems by this Commission in isolated controversies. Indeed, it is in the public interest that there be a comprehensive examination or reexamination of all the difficult issues between Seatrain and the railroads. It is in the interest of all that these problems receive authoritative over-all solution. Both Seatrain and the railroads have an obligation, to the public and to this Commission, to obtain resolution of these many

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> issues and thus terminate what would otherwise be an unending controversy. In recognition of that responsibility, the complainant railroads file this comprehensive complaint."

All of the railroads which have or *might have through routes* with Seatrain, *or which might own cars that might be interchanged with Seatrain,* are made formal defendants in this proceeding. There would appear to be no reason why the allegations of Seatrain, as set forth in the complaint in this suit, may not be projected before the Commission in the course of its hearing and investigation of the above petition pending before it.

Naturally Seatrain is suspicious of this move upon the part of the railroads and objects that many of the matters proposed by the petition have already been litigated before the Commission and that the petition has been filed in the hope of gaining further delay. It is a fact that heretofore fragmentary actions have been instituted before the Commission but with the interjection by Seatrain of the issues raised in this suit the proposed action should afford a complete review of them and the prescription of such terms and practices as may be determined to be just to Seatrain, the railroads and the public.

In this view there appears to be no utility in holding the complaint in court and staying proceedings thereon as in *General American Tank Corp.* v. *El Dorado Terminal Co.,* 308 U. S. 422 (1940); *S. S. W., Inc.* v. *Air Transport Ass'n of America,* D. C. Cir., 191 F. 2d 658, and *Apgar Travel Agency, Inc.* v. *International Air Transport Ass'n, et al.,* S. D. N. Y., Oct. 2, 1952, Civ. No. 69-363. Rather the course here is dictated by *Far Eastern Conference* v. *United States,* 342 U. S. 570, 576-577 (1952) where the Court said:

> "Having concluded that initial submission to the Federal Maritime Board is required, we may either order the case retained on the District Court

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docket pending the Board's action, General American Tank Car Corp. v. El Dorado Terminal Co., 308 U. S. 422, 432-433; El Dorado Oil Works v. United States, 328 U. S. 12, 17; see United States v. Interstate Commerce Commission, *supra,* at 465, n. 12, order dismissal of the proceeding brought in the District Court. As distinguished from the situation presented by the first El Dorado case, *supra,* which was a contract action raising only incidentally a question proper for initial administrative decision, the present case involves questions within the general scope of the Maritime Board's jurisdiction. Shipping Act of 1916, §§ 14, 15, 39 Stat. 728, 733, 46 U. S. C. §§ 812, 814. An order of the Board will be subject to review by a United States Court of Appeals, with opportunity for further review in this Court on writ of certiorari. Pub. L. No. 901, 81st Cong., 2d Sess., §§ 2, 10, 64 Stat. 1129, 1132. If the Board's order is favorable to the United States, it can be enforced by process of the District Court on the Attorney General's application. 39 Stat. 728, 737, 46 U. S. C. § 828. We believe that no purpose will be served here to hold the present action in abeyance in the District Court while the proceeding before the Board and subsequent judicial review or enforcement of its order are being pursued. A similar suit is easily initiated later, if appropriate. Business-like procedure counsels that the Government's complaint should now be dismissed, as was the complaint in *United States Navigation Co.* v. *Cunard Steamship Co., supra.*"

Therefore plaintiff's motion for a preliminary injunction is denied and defendants' motions to dismiss the complaint are granted.

An order in conformity herewith should be settled.

* * * * *

Exhibit B

PRAYERS FOR RELIEF, AS AMENDED, IN THE ANTI-TRUST PROCEEDING

The prayers for relief, as amended, in the Anti-Trust proceeding read as follows:

> "That this Honorable Court make and enter its judgment herein restraining and enjoining defendants and each of them, and their subsidiaries, affiliates and successors, and their officers, employees, committees and agents, and any other persons acting in concert with them, from doing any of the following, or taking any action furthering or intended or reasonably calculated to further, the accomplishment of any of the following, pursuant to or in furtherance or continuance of the conspiracy herein alleged:
>
> Initiating proceedings against Seatrain or its rail connections or forcing Seatrain to institute proceedings against defendants or any of them either before the Interstate Commerce Commission or before any Court, in bad faith or without probable cause, or intervening in or opposing in bad faith or without probable cause proceedings brought by Seatrain or any of Seatrain's connecting carriers, or in any such proceedings knowingly or recklessly misrepresenting facts not of record therein, or making misleading statements of fact not so of record, to the Interstate Commerce Commission or to other tribunals, respecting Seatrain or relating to transportation via Seatrain;
>
> Bringing or maintaining suits or proceedings, or forcing Seatrain to bring such suits or proceedings, or protracting or delaying the same, or multiplying the number thereof, or of the interlocutory

> motions or proceedings or issues or hearings therein, needlessly, vexatiously, or frivolously, or for the purpose or with the intended effect of creating uncertainties as to the continuing availability to shippers or potential shippers via Seatrain of Seatrain service or the economies inherent therein, or subjecting Seatrain to expense or delay, or consuming its financial resources or the time and energies of its its officers, or maintaining or enhancing the effectiveness of any boycott of Seatrain, or otherwise injuring Seatrain, or in any proceedings knowingly or recklessly misrepresenting facts not of record therein, or making misleading statements of fact not so of record, to the Interstate Commerce Commission or to other tribunals, respecting Seatrain or relating to transportation via Seatrain;"

The same relief was sought from restrictions in connection with the use of cars as follows:

> "Making or continuing arrangements and agreements for the interchange and use of loaded freight cars by and among or between railroads while excluding Seatrain from the benefits of equally unrestricted participation in the benefits of such arrangements and agreements;
>
> Denying to Seatrain the interchange and use of loaded freight cars, or granting the same on terms or conditions less favorable to Seatrain than those granted to defendants and other railroads engaged in transportation in interstate commerce;
>
> Asserting or implying that the absence or nonexistence of a through route or of through routes between them or any of them, or any other railroad, and Seatrain, precludes or in any manner limits,

hampers, restricts or prevents the delivery to, or receipt or use by, or acceptance from, or interchange with, Seatrain or any of its connecting rail carriers, or the loading or making available for loading, for movement via Seatrain or any of its connecting rail carriers, of any freight car or cars owned by any defendant or other railroad, unless the same restriction is asserted as being made equally and contemporaneously applicable to all rail carriers and car-ferries in the United States;

Restricting, prohibiting or withholding their consent to the making available for loading for movement via Seatrain, or to the delivery to, acceptance from, receipt or use by, or interchange with, Seatrain in transportation in interstate commerce of any freight cars owned by them or any other railroad, or from asserting that such making available for such loading, delivery, receipt, acceptance, interchange or use is limited or prohibited, or that such consent is withheld unless and except only that the same restriction or prohibition, or the same withholding of consent, applies contemporaneously and equally to all rail carriers and car-ferries in the United States;

Publishing or continuing in effect, unrevoked, any published statements, issuing bulletins, or making, sending or disseminating any other communications calculated to cause, or having the reasonably likely effect of causing agents, shippers or potential shippers of freight to be instructed or informed, or in any way indicating to shippers or potential shippers of freight, that there is any restriction or limitation upon, or impediment or obstacle to, or prohibition against, the delivery of cars to Seatrain, or acceptance of cars from Seatrain, or interchange of cars with Seatrain, or the receipt or use of cars by Seatrain, or the making available of cars for loading for movement via Seatrain, unless and except only that the same restrictions, limitations, impediments, obstacles or prohibitions apply, and are stated to apply, equally and contemporaneously to all railroads and car-ferries engaged in interstate commerce in the United States; and all agents and shippers are likewise so informed;

Monopolizing in the hands of defendants and other railroads (and railroad-owned or controlled car-ferries) the unrestricted interchange and use of railroad-owned freight cars that are loaded and transported in interstate commerce;

Making or continuing in effect any arrangements or agreements which amount in effect to reciprocal licensing arrangements affecting the interchange, delivery, receipt, acceptance or use of loaded freight cars, or making cars available for loading for movement, while excluding Seatrain therefrom;

Denying to Seatrain the benefit of participation in any arrangements or agreements relating to or affecting the interchange with, delivery to, acceptance from, receipt or use by, or loading or making available for loading for movement via Seatrain or any of Seatrain's rail connections, on terms no less favorable to Seatrain and to Seatrain's rail connections than are applicable to defendants or other railroads;

Boycotting Seatrain in any respect as regards the making available for loading for movement, hauling, interchange, delivery, receipt, acceptance or use of loaded freight cars belonging to any defendant or other railroad, or attempting to induce any other railroad to boycott Seatrain in any such respect;

Utilizing the Association or any of its officers, employees, committees, agents, mechanisms, records, procedures or facilities in any way to aid, coordinate or implement any of the foregoing, or to induce or compel other railroads to join with defendants or any of them in any of the foregoing, or to promulgate any rule, regulation or agreement or to continue or purport to continue in effect any rule, regulation or agreement, or issue any bulletin or other communication to its members, or do any other act or thing reasonably likely to have any such effect;

Publishing, promulgating, issuing, or continuing or purporting to continue in effect, or causing to be published, promulgated, issued, or continued or purported to be continued in effect, the Association's present Car Service Rule 4 or any other Car Service, Per Diem or other rule or regulation which imposes or purports to impose any limitation or restriction upon, or obstacle to, the making available for loading for movement via Seatrain, interchange, delivery, receipt, acceptance or use by Seatrain of loaded freight cars owned by any railroad, that are not equally and contemporaneously imposed upon all other railroads (and railroad-owned or controlled car-ferried) engaged in interstate commerce."

Relief was also sought from the actions of the defendants in:

"Coordinating or implementing any of the foregoing or in any way inducing or compelling any railroads to join with defendants or any of them in any of the foregoing, or promulgating any rule, regulation or agreement or continuing or purporting to continue in effect any rule, regulation or agreement, or issuing any bulletin or other indication to members of any of the defendant unincorporated associations, or doing any other act or thing, reasonably likely to have any such effect, or causing any of the foregoing to be done.

Doing any other act or thing to further the combination and conspiracy herein alleged or to accomplish the objects and purposes thereof."

Exhibit C

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1952

No. ....

Seatrain Lines, Inc.,
Petitioner,

vs.

Pennsylvania Railroad Company, Atlantic Coast Line Railroad Company, Louisville & Nashville Railroad Company, Southern Railway Company, Baltimore and Ohio Railroad Company, Seaboard Air Line Railroad Company, Erie Railroad Company, Association of American Railroads,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT, BEFORE THE RENDITION OF JUDGMENT IN THE COURT OF APPEALS

Seatrain Lines, Inc. respectfully prays that a writ of certiorari be issued to review judgments of the District Court of the United States for the District of New Jersey, before the rendition of judgment by the Court of Appeals.

Opinion Below

The opinion of the District Court (Doc. Nos. 119, 120 and 122) has not yet been reported.

Exhibit C

Jurisdiction

The judgment of the District Court was entered against all respondents other than respondent Louisville & Nashville Railroad Company on November 12, 1952, and against said respondent on November 21, 1952 (Doc. Nos. 121 and 123), dismissing a complaint (Doc. No. 4) which sought injunction and damages for a conspiracy in violation of the antitrust laws and denying petitioner's motion for a preliminary injunction (Doc. No. 53), on the ground that the Interstate Commerce Commission had exclusive jurisdiction of the subject matter. Separate judgments of dismissal, without prejudice, were entered as against four other railroads originally named as defendants, on February 1, 1952, November 21, 1952, December 3, 1952 and December 8, 1952 respectively (Doc. Nos. 37, 120, and 127 and Ct. App. Docket Entry under date Dec. 8, 1952); and the action was dismissed without prejudice against six traffic associations originally named as defendants, on April 26, 1952 (Doc. No. 109). Appeal was docketed in the Court of Appeals for the Third Circuit on November 25, 1952 (Ct. App. Docket Entry under date Nov. 25, 1952). The jurisdiction of this Court is invoked under Section 1254 of the Judicial Code, as amended (28 U. S. C. Sec. 1254).

Questions Presented

The broad question involved in this case is whether the District Court erred in holding that it lacked jurisdiction of the subject matter of the complaint herein which alleges a combination and conspiracy to monopolize and

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restrain interstate trade and commerce in the transportation of freight. The Court's holding that it lacked jurisdiction was based solely upon its holding that the Interstate Commerce Commission had exclusive subject-matter jurisdiction as to all of the various means alleged to have been employed in carrying out the conspiracy. The particular questions presented thus concern the Interstate Commerce Commission's jurisdiction over such means, specifically two of them. The questions are:

1. Whether the District Court erred in holding that the Interstate Commerce Commission has jurisdiction to require a railroad to permit the interchange and use of its cars in the transportation of freight in interstate commerce by a water carrier when such railroad does not participate in and maintain through routes with such water carrier, it appearing that the Interstate Commerce Commission had already decided in proceedings between the same parties that its jurisdiction to require such interchange and use was limited to cars of railroads participating in and maintaining through routes with such water carrier.

2. Whether the District Court erred in holding that the Interstate Commerce Commission has jurisdiction to award reparation for the damages caused petitioner by respondents' use of unfair competitive practices not prohibited or declared to be unlawful or otherwise mentioned in the Interstate Commerce Act. This question is squarely raised by the allegation (Doc. No. 4 at pp. 37-39) that defendants have utilized available administrative and court procedures, in bad faith or without probable cause, know-

ingly or recklessly misrepresenting facts therein, making misleading statements of fact therein, multiplying and protracting proceedings thereunder, in bad faith or without probable cause, not to obtain settlement of issues, but with the intended effect of continuing and creating doubts and uncertainties, all for the purpose of preventing future diversion of all-rail traffic to petitioner.

Statutes Involved

The Statutes involved are Section 7 of the Sherman Antitrust Act (15 U.S.C. Section 15), Section 16 of the Clayton Act (15 U.S.C. Section 26) and Sections 8 and 16(1) of the Interstate Commerce Act (49 U.S.C. Sections 8 and 16(1)); the following sections of the Interstate Commerce Act are referred to by the District Court (Doc. No. 119, fn4 at pp. 19-20) as bearing upon the Interstate Commerce Commission's jurisdiction: 1(4), 1(10), 1(13), 1(14)(a), 3(4), 7, 15(3) and 305(b), (49 U.S.C. Sec. 1(4), 1(10), 1(13), 1(14)(a), 3(4), 7, 15(3) and 905(b)). The texts of said statutes, and of the declaration as to the National Transportation Policy prefixed to The Transportation Act of 1940, are reproduced in Appendix A hereof.

Statement

This action arises under the antitrust laws of the United States, specifically Sections 1 and 2 of the Sherman Act, and invokes the remedies provided in Section 7 of the Sherman Act and Section 16 of the Clayton Act (Doc. No. 4 at pp. 1-2).

Exhibit C

(A) The Conspiracy Charged, the Relief Sought, and the District Court's Dismissal and Denial.

The complaint seeks damages caused by, and injunctive relief against, an alleged combination and conspiracy by defendant and other railroads, and defendant Association of American Railroads, to monopolize in the hands of railroads the transportation of freight in interstate trade and commerce, and to restrain and limit the competition of Seatrain, a water carrier, with railroads, in such commerce, by restraining and limiting petitioner's development, growth and expansion, and if possible, driving petitioner out of business as a competitor of railroads in such commerce (Doc. No. 4 at pp. 18-20).

The claim for damages[1] is based solely upon petitioner's loss of earnings resulting from the restraint upon petitioner's growth and expansion as a competitor effected by the combination and conspiracy (Doc. No. 4 at pp. 41-43, 50).

The amended complaint originally prayed for broad injunctive relief, not only against the combination and conspiracy itself, but against the numerous means alleged to have been concertedly employed in carrying it out (Doc. No. 4 at pp. 43-49); however, in order to bring certain of the jurisdictional issues into sharp focus, all other prayers for specific injunctive relief were withdrawn at the hearing except those directed against two particular types of means utilized in carrying out the conspiracy, namely, (1) the concerted exclusion of Seatrain from the benefit of the railroads' joint arrangements for the use and interchange of freight cars owned by railroads which do not participate in and maintain through routes with Seatrain, and (2) the concerted use of unfair competitive practices which are not prohibited or declared unlawful or even mentioned in the Interstate Commerce Act (Doc. No. 122).

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[1] Asserted against respondents Pennsylvania, Atlantic Coast Line, Louisville & Nashville, and Southern railroads, herein and in the complaint called the "primary defendants."

Petitioner moved for preliminary injunction to restrain the aforesaid exclusion from the benefits of arrangements and agreements as to use and interchange of cars (Doc. No. 53). Respondents moved to dismiss the complaint on the grounds that exclusive jurisdiction over the subject matter of the action is vested in the Interstate Commerce Commission (Doc. Nos. 52, 69, 70, 71, 72, 73, 75). Argument on both motions was heard on April 14, 1952 (Relevant District Ct. docket entry under date Apr. 29, 1952).

The District Court held that it lacked jurisdiction to give any of the relief sought, either by injunction or damages, on the ground that the Commission had exclusive jurisdiction with respect thereto (Doc. No. 119); it granted respondents' motion to dismiss the complaint and denied petitioner's motion for preliminary injunction (Doc. Nos. 121, 123).

(B) Question No. 1: The Conflict of Decision Between the Commission and the District Court.

Petitioner (herein sometimes called Seatrain) operates as a common carrier by water of commodities generally in interstate commerce between the Port of New York and the Ports of New Orleans, Texas City and Savannah, under due certifications and authorization by the Interstate Commerce Commission (Doc. No. 54 at p. 10).

Seatrain now owns seven "Seatrain-type" vessels, specially designed and constructed for the carriage of freight in railroad cars. The cars are loaded bodily into the Seatrain vessels from adjacent tracks on the docks by special hoisting equipment at the terminals where Seatrain owns and maintains physical equipment for the interchange of freight cars with its rail connections (Doc. No. 54 at pp. 10-11).[1]

Arrangements and agreements among the railroads of the United States have existed for many years under which railroad-owned freight cars[2] are interchanged and used in interstate commerce by all railroads and water carriers except Seatrain, without restriction (Doc. No. 54 at pp. 14-16, 64). This exclusion of Seatrain as a means used to carry out the alleged conspiracy is charged to be unlawful not merely as a means used in furtherance of the larger conspiracy to monopolize and restrain trade, but as in itself an unlawful monopolization (Doc. No. 4 at pp. 18-21, 25-34).

One of the devices employed by the railroads to implement this exclusion was their adoption and promulgation, through their Association, in 1932, of Car Service Rule 4, reading (Doc. No. 54 at pp. 26-28, 77):

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[1] For a further description of the Seatrain operation and the advantages of its services to the public, the Court is respectfully referred to its opinion in *United States* v. *Pennsylvania R. Co.*, 323 U. S. 612, at pp. 613 *et seq*.

[2] Constituting over 98% of all freight cars (affidavit of A. F. Swinburne, Doc. No. 83 at p. 11).

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> "Cars of railroad ownership must not be delivered to a steamship, ferry or barge line for water transportation, without permission of the owners filed with the Car Service Division."

The subsequent Commission finding that "the sole object of the Association of Railroads' rule was to prevent diversion of traffic from the railroads to Seatrain", is cited in the opinion of this Court in *United States* v. *Pennsylvania R. Co.,* 323 U. S. 612, at page 614.

Promptly after the Rule was promulgated, Seatrain's connecting carriers initiated proceedings before the Interstate Commerce Commission,[3] alleging that the rule, and the railroads' refusal to permit interchange of their cars with Seatrain thereunder, were unlawful under the Interstate Commerce Act. Seatrain intervened. The railroads opposed, claiming among other things that the Commission had no jurisdiction to require interchange of railroad-owned cars with Seatrain (Doc. No. 54 at pp. 38-39).

The Commission held (*Investigation of Seatrain Lines, Inc.,* 206 I. C. C. 328, 1935):

> "We find nothing in the act imposing any duty upon or giving us jurisdiction to require a rail carrier to permit delivery of its cars to a water carrier where through routes between such rail and water carriers do not exist.
>
> * * *
>
> "There is no duty to interchange cars with Seatrain resting on those defendants who are not parties to through routes with it . . ." (p. 343)

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[3] I. C. C. Docket Nos. 25728 and 25878.

Exhibit C

The Commission held, however, that under its power over "through routes," it had jurisdiction to require a railroad which was a party to a through route with a water carrier to interchange its cars with such water carrier in connection with the operation of such through route (pp. 343, 344).

On January 28, 1938 (226 I. C. C. 7) the Commission repeated its earlier finding, saying (p. 30):

> ". . . we may not, in the absence of through routes, require it [a rail carrier] to furnish cars that are to be delivered to a water carrier contrary to the express directions of the owners of the cars."

Those proceedings initiated in 1932 continued (with the injection of additional issues and many complications and delays (Doc. No. 54 at pp. 42-45)) until, on October 13, 1941, the Commission ordered defendants in said proceedings

> "*according as they participate in through routes* with complainants and Seatrain Lines, Inc., in interstate commerce, via Belle Chasse, La., and Hoboken, N. J. . . . to abstain from observing and enforcing their present rules, regulations and practices which prohibit the interchange of their freight cars with complainants herein for transportation by Seatrain Lines, Inc. in interstate commerce" (Ex. 31 to aff., Doc. No. 54 at pp. 222-23, emphasis supplied).

This order was appealed by certain railroads, and its effectiveness automatically suspended thereby, until this Court upheld it in all respects on January 29, 1945 (*United States* v. *Pennsylvania R. Co.*, 323 U. S. 612).

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This order, as it showed on its face, was based upon the Commission's limited authority to require those (and only those) railroads which participate in and maintain through routes with Seatrain to permit their cars to be delivered to Seatrain "according as they participate in [such] through routes."

Thus, from 1932 to 1945, Seatrain sought to obtain the privilege of carrying the very railroad cars which carry freight to its ports, but was unsuccessful in its attempts to obtain such right except as to cars owned by railroads which participated in through routes with Seatrain. The number of cars owned by railroads which participate in through routes with Seatrain is but a fraction of the total number of railroad-owned cars which are available for use by every other carrier in the United States engaged in interstate commerce (Doc. No. 54 at pp. 64-68 and Ex. 40 to aff., at p. 255). Without the privilege of carrying the very railroad cars which carry freight to its ports, Seatrain's type of service cannot be rendered to the public except to a limited extent. As this Court pointed out in *United States v. Pennsylvania R. Co., supra* (at pp. 616-617):

> "The interrelationship of the three parts of the [Interstate Commerce] Act was made manifest by its declaration of a 'national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act, so administered as to recognize and preserve the inherent advantages of each' . . .
>
> "This policy cannot be carried out as to Seatrain's interstate carriage unless railroads interchange their cars with it. The particular type of

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> service introduced by Seatrain, and found by the Commission to be qualitatively superior, cannot be rendered without the privilege of carrying the very railroad cars which carry freight to its ports. The 'inherent advantages of this service' would be lost to the public without railroad car interchange.''

On November 13, 1951, the Interstate Commerce Commission granted Seatrain temporary authority to operate a new service between the Ports of New York and Savannah, saying (Doc. No. 54, at pp. 61-62):

> ''We find that there is an immediate and urgent need for applicant's proposed service as a common carrier by self-propelled vessels in the transportation of commodities generally between the Ports of New York and Savannah, and that there is no carrier service capable of meeting such need.''

Seatrain inaugurated regular service pursuant to this authority on November 30, 1951 (Doc. No. 54 at p. 62). The Record shows that it was promptly confronted with a new series of obstructions and obstacles by concerted action of the respondents and other railroads (Doc. No. 54 at pp. 69-86).

Accepting the limitations on the Commission's jurisdiction established by the foregoing decisions, Seatrain brought this action under the antitrust laws to obtain the right to carry ''the very railroad cars which carry freight to its ports,'' which are not owned by railroads participating in or maintaining through routes with Seatrain,—which right is essential in order for Seatrain to give the public the ''inherent advantages'' of its service. Respondents thereupon completely reversed their contentions which they had urged over many years before the Commission and this Court[1] (Doc. No. 107 at pp. 2 *et seq.*); see also *United States* v. *Pennsylvania R. Co., supra,* p. 615. And now the District Court has upheld their new contention that the Court has no jurisdiction under the anti-trust laws because the Commission has exclusive jurisdiction under the Interstate Commerce Act.

The final decision of the Commission was made,[2] and its order issued thereon, on October 13, 1941—a year after the passage of the Transportation Act of 1940. Since the passage of that Act, there have been no amendments to the Interstate Commerce Act which pertain in any way to the jurisdiction of the Commission herein involved. Therefore, the District Court's holding that the Commission now has exclusive jurisdiction must also be that the Commission has had exclusive jurisdiction at least since the passage of the Transportation Act of 1940.

(C) Question No. 2: The Commission's Power to Grant Reparations.

The complaint alleges numerous means used by the defendants to carry out the conspiracy. Some of the acts so charged as means were subject to the jurisdiction of the Interstate Commerce Commission; others were not (Doc. No. 4, pp. 20-41).

The complaint alleges in paragraphs 56, 57 and 58 (Doc. No. 4 at pp. 37-38) that defendants concertedly utilized available administrative and court procedures in bad faith or without probable cause, knowingly and recklessly misrepresenting facts therein, making misleading statements of fact therein, multiplying and protracting proceedings thereunder, in bad faith or without probable cause, not for the purpose of obtaining settlement of issues, but with the intended effect of continuing and creating doubts and uncertainties, all for the purpose and with the effect of preventing future diversion of all-rail traffic to Seatrain in furtherance of the conspiracy.

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[1] Respondents Baltimore and Ohio, Erie and Association, though parties to the I. C. C. proceedings, were not parties to the appeal.

[2] *Hoboken Mfrs. Railroad Company* v. *Abilene and Southern Railway Company,* 248 I. C. C. 109.

The District Court held that the damages inflicted by the employment of these means in carrying out the alleged conspiracy were not recoverable under the antitrust laws because:

> "... They must follow the major charge as being within the jurisdiction of the Commission.
>
> "Neither can this Court maintain jurisdiction over the suit insofar as it claims treble damages from the primary defendants under the holding herein that the complaint charges acts cognizable under the primary jurisdiction of the Commission which are remediable under its reparation power ..." (Doc. No. 119 at p. 24.)

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REASONS FOR GRANTING THE WRIT

I.

The conflict in decision between the Interstate Commerce Commission and the District Court should be resolved by this Court.

In October, 1941, the Commission, in the light of the Transportation Act of 1940, reaffirmed its jurisdictional holdings made in 1935 and 1938 (pp. 8-10, *supra*) (*Hoboken Mfrs. Railroad Company* v. *Abilene and Southern Railway Company,* 248 I. C. C. 109, at pp. 109-110), and ordered those railroads (which included all of the primary defendants herein) according as they participate in through routes with petitioner, to permit interchange and use of their cars by petitioner, according as they participated in such through routes.[1]

Upon review of that order, in *United States* v. *Pennsylvania R. Co., supra,* the railroads contended that amendments to the Interstate Commerce Act by the Transportation Acts of 1920 and 1940 had taken away from the Commission *all power* over interchange and use of cars by a water carrier, even where a through route existed. It was with reference to this argument that this Court "interpreted" the National Transportation Policy in language which led the District Court in this case to overrule the Commission's decision, and hold that the Commission has the power to require all railroads to permit unrestricted use and interchange with petitioner, a water carrier, of cars owned by railroads which do not participate in or maintain through routes with petitioner.

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[1] Certain of the secondary defendants, which had been parties to the original proceedings, had previously consented to use of their cars by Seatrain (Doc. No. 54 at p. 48).

This conflict in decision between the Commission and the District Court, each holding that it has no jurisdiction to grant relief to Seatrain in the matter of the interchange of cars belonging to railroads which do not participate in and maintain through routes with Seatrain, is one which this Court should resolve. The Commission's decision that it has a limited jurisdiction (*i.e.*, as to cars of participants in through routes) has already been subjected to Court review and has, indeed been upheld by this Court, in *United States* v. *Pennsylvania R. Co., supra.*

In order to comply with the District Court's suggestion in this case that it again resort to the Commission, petitioner has applied to the Commission for a declaratory order under Section 5 (d) of the Administrative Procedure Act, defining the extent and basis of the Commission's jurisdiction in the premises.[2] Petitioner hopes in this way to gain the benefit of a current expression by the Commission of its views as to the two questions here presented to the Court. But petitioner also recognizes that no decision by the Commission on these questions can finally settle these issues,—that only a decision by this Court can have that effect. Whatever declaratory order the Commission might make would not be binding on anyone who might choose to challenge it or challenge any action of the Commission taken in pursuance thereof.

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[2] A copy of this application as filed with the Commission is annexed hereto as Appendix B.

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In view, moreover, of the fact that the District Court's opinion fails to indicate any section or sections of the Interstate Commerce Act as conferring jurisdiction upon the Commission, but instead relies upon the "spirit" of the National Transportation Policy, which Policy does not in itself grant any power to the Commission or impose any duties upon the railroads, petitioner sees little reason to expect that the Commission will depart from its former final holding, unless this Court itself, in resolving the conflict, directs it to do so.

In the meantime, the two conflicting decisions by the Commission and the District Court stand in the way of petitioner's obtaining, in either forum, the relief which it needs to enable it fully to make available to the public the special advantages inherent in its service (See *United States* v. *Pennsylvania R. Co., supra,* at p. 617).

To prevent such conflict and uncertainty, this Court has been given direct appellate jurisdiction to review cases under the Interstate Commerce Act, without their passing through the Courts of Appeal. (Jud. Code Secs. 1253, 1291). The same considerations apply, *mutatis mutandis,* to the decision of these questions as to the interpretation of the Interstate Commerce Act, in this antitrust case. And since the conflict, and resulting uncertainty, as to the application of the Interstate Commerce Act to petitioner's use and interchange of railroad-owned freight cars, were engendered by the District Court's interpretation of this Court's opinion in *United States* v. *Pennsylvania R. Co., supra,* only this Court can, in the final analysis, resolve that conflict or remove that uncertainty.

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Finally, the District Court's decision creates, but gives no help in resolving, the question as to the statutory basis in the Interstate Commerce Act of the power which it concluded that the Commission "must have." In the prior proceedings before it, the Commission was unable to find any provision of the Act conferring upon it such power.

This Court's opinion in *United States* v. *Pennsylvania R. Co., supra,* being confined to through routes, throws no light on this question. If it is the Commission rather than the Court which has the power to give petitioner the relief it is seeking, petitioner and the Commission alike are urgently in need of guidance as to the particular provisions of the Act under which that relief should be sought and granted.

This conflict in decision between the Commission and the Courts also raises squarely the important question whether the District Court was free to disregard the Commission's earlier decision, in proceedings between the same parties, as to the Commission's own lack of power.

The doctrine of primary jurisdiction requires initial resort to the administrative agency, to obtain relief which it has jurisdiction to give, in order to preserve that unity in the system of regulation which the Interstate Commerce Act was designed to achieve. *Texas & Pacific Ry. Co.* v. *Abilene Cotton Oil Co.,* 204 U. S. 426 (1907). When the Commission asserts jurisdiction, and either grants or denies relief, its decision is not subject to collateral attack, but can only be reviewed directly by the special procedures provided in the Judicial Code.

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Interstate Commerce Act, Section 17 (9);
Venner v. *Michigan Central R. R. Co.,* 271 U. S. 127 (1926);
Terminal Warehouse Co. v. *Pennsylvania R. Co.,* 297 U. S. 500 (1936).

This case presents the reverse question, which is of equal importance in the administration both of the Interstate Commerce Act and of the antitrust laws, whether a decision of the Commission denying its own jurisdiction is subject to collateral attack. It likewise presents the cognate question as to the effect of a decision by the Interstate Commerce Commission, and a Court decision upholding the same, as *res judicata,* in a subsequent action between the same parties under the antitrust laws. (cf. *Terminal Warehouse Co.* v. *Pennsylvania R. Co., supra.*)

II.

This case presents an important question as to the Commission's jurisdiction to award reparation under the Interstate Commerce Act which has not been but should be passed upon by this Court.

The complaint alleges a conspiracy among the defendants and other railroads to monopolize interstate trade and commerce in the transportation of freight and to restrain the competition, and limit and prevent the growth and development of petitioner Seatrain, a water carrier, as a competitor with railroads in such commerce, and if possible to drive it out of business (Doc. No. 4 at pp. 18-20).

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Among the means alleged to have been used by defendants to carry out the conspiracy were those subsumed by the District Court under the term "unfair competitive practices."

The complaint charges, as such means, the concerted utilization of available administrative and court procedures, in bad faith or without probable cause, knowingly and recklessly misrepresenting facts therein, making misleading statements of fact therein, multiplying and protracting proceedings thereunder, in bad faith or without probable cause, not for the purpose of obtaining settlement of issues, but with the intended effect of continuing and creating doubts and uncertainties, all for the purpose and with the effect of preventing future diversion of all-rail traffic to Seatrain in furtherance of the conspiracy (Doc. No. 4 at pp. 37-39).

No provision of the Interstate Commerce Act prohibits or declares unlawful the use of such practices in proceedings before the Commission, to say nothing of proceedings before the courts.

The District Court held, however, with respect to petitioner's charges as to such practices (Doc. No. 119 at p. 24):

> "The subsidiary charges made by Seatrain as to unfair competitive practices upon the part of the defendants are incidental to the main allegations of the complaint that the defendants have conspired to deny to Seatrain interchange and use of freight cars owned by railroads. They must follow the

> major charge as being within the jurisdiction of the Commission.
>
> Neither can this court maintain jurisdiction over the suit in so far as it claims treble damages from the primary defendants under the holding herein that the complaint charges acts cognizable under the primary jurisdiction of the Commission which are remediable under its reparation power."

As alleged in the complaint, these charges as to "unfair competitive practices" are not "subsidiary" to, but coordinate with, the charges involving exclusion from car interchange; the "major charge", to which both are alike "subsidiary", is the charge that defendants have conspired to limit petitioner's growth and development and if possible to drive it out of business as a competitor of railroads in interstate commerce, by use of these means, among others.

Petitioner recognizes, of course, that it is not entitled to recover under the antitrust laws injuries remediable under the reparations power of the Commission. It does not seek any such damages in this case. It does seek, however, recovery of such damages as it can prove it has sustained that are not remediable under the reparations power of the Commission—a recovery which this Court, in *Terminal Warehouse Co.* v. *Pennsylvania R. Co., supra,* indicated it was entitled to have.

The District Court avoided this question by holding that all of petitioner's damages would be recoverable as reparations before the Commission (Doc. No. 119, at p. 24).

This Court has already indicated, however, in *Terminal Warehouse Co.* v. *Pennsylvania R. Co., supra,* that the underlying conspiracy pursuant to which the acts were done, is not enough to bring within the Commission's jurisdiction (under Section 16, par. 1) to award damages for a violation of the Act, the damages caused by acts which are not prohibited or declared to be unlawful (see Section 8), or indeed even mentioned by any section of the Act.

III.

The Public Interest would be served by a Prompt Review.

This Court has cited with approval the finding of the Interstate Commerce Commission that Seatrain's "interstate operations were in the public interest and of advantage to the convenience and commerce of the public."[1]

By reason of the matters alleged and shown in this case, the respondents have injured and are now injuring not only Seatrain, but to a far greater extent the public, by depriving numerous industries and communities of the efficient and economical transportation which Seatrain could otherwise provide. The injury thus inflicted on the public by the unlawful combination and conspiracy exceeds in amount even the very substantial injury inflicted upon Seatrain as a servant of the public.

More than a year ago the Commission granted Seatrain authority to inaugurate its New York-Savannah service, saying (Annex C to aff., Doc. No. 54 at p. 125):

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[1] *United States* v. *Pennsylvania R. Co.*, 326 U. S. 612, at p. 614.

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> "We find that there is an immediate and urgent need for applicant's proposed service . . . and that there is no carrier service capable of meeting such need."

In dismissing an action by the railroads brought to annul and set aside that order of the Commission, the District Court for the Eastern District of Virginia on December 14, 1951 (Annex D to aff., Doc. No. 54 at pp. 126-132) approved findings of the Commission underlying its grant of authority that the immediate and urgent need found by the Commission "was demonstrated by the port history, the port economy, and the port demands of the Savannah area"; that industries had chosen the Savannah area for their plants "because of the available coastal ship service", which had all been suspended in 1942 and none restored when the Commission's order was made. "Their anticipated expansion was predicated on this service. Commercial ties with manufacturers in the northeast United States, and competition with other ports along the Atlantic Ocean front, were not maintainable by shippers in the Southeast without water transportation at hand in Savannah" (Annex D to aff., Doc. No. 54 at p. 128).

The Virginia District Court also pointed to the fact that the Federal Maritime Board had urged the Commission to authorize the service on the ground that "It is necessary for the national defense and development of its foreign and domestic commerce that the United States shall have a merchant marine", and called attention to the 1,861,900 tons of commodities water-borne between Savannah and New York, in the period 1939-42 (Annex D to aff., Doc. No. 54, at p. 129).

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Yet due to the conflict of decisions between the Commission and the District Court, each finding that it has no jurisdiction to give petitioner adequate (or any) relief as to car interchange, the parties to the conspiracy continue, and until such conflict has been resolved by this Court,[3] will continue, to frustrate this public interest.

Petitioner commenced service between New York and Savannah on November 30, 1951, immediately following the Commission's grant of temporary authority to furnish the public with a service which it found was urgently and immediately needed. For the past year, Seatrain has sought from the Federal Court "the privilege of carrying the very railroad cars which carry freight to its ports" (See *United States* v. *Pennsylvania R. Co., supra,* at p. 617), not owned by railroads which participate in and maintain through routes with Seatrain. Seatrain has been unable to render to the public the superior service of which it is capable because of the lack of this right. The service has been materially restricted and hampered by reason of Seatrain's inability to obtain that right. Relief from such restrictions is needed as urgently and immediately as the service itself is needed so that Seatrain can give the public the inherent advantages which cannot be given until it obtains the right to carry all cars.

The second question presented is so interrelated with the first that it, too, requires prompt determination. Accord-

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[3] Inasmuch as the conflict of decisions presented by this case arose out of the District Court's interpretation of an opinion of this Court upholding an order of the Commission which reflected contrary findings, it would hardly appear helpful to this Court to have a further interpretation by the Court of Appeals.

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ingly, petitioner respectfully prays that this Court grant certiorari to review both of the questions presented, but not either one of them without the other.

Respectfully submitted,

Carl E. Newton,

Theodore S. Hope, Jr.,

Attorneys for Petitioner,
Seatrain Lines, Inc.

Of Counsel:

Donovan, Leisure, Newton,
Lumbard & Irvine,

Dated: December 10, 1952.

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APPENDIX A

Statutes Involved

Sherman Antitrust Act, sec. 7.

> "Any person who shall be injured in his business or property by any other person or corporation by reason of anything forbidden or declared to be unlawful by this act, may sue therefor in any district court of the United States in the district in which the defendant resides or is found, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the costs of suit, including a reasonable attorney's fee."

Clayton Act, sec. 16.

> "That any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief, in any court of the United States having jurisdiction over the parties, against threatened loss or damage by a violation of the antitrust laws, including sections two, three, seven and eight of this Act, when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity, under the rules governing such proceedings, and upon the execution of proper bond against damages for an injunction improvidently granted and a showing that the danger of irreparable loss or damage is immediate, a preliminary injunction may issue: *Provided*, that nothing herein contained shall be construed to entitle any person, firm, corporation, or association, except the United States, to bring suit in equity for injunctive relief against any common carrier subject to the provisions

of the Act to regulate commerce, approved February fourth, eighteen hundred and eighty-seven, in respect of any matter subject to the regulation, supervision, or other jurisdiction of the Interstate Commerce Commission."

Interstate Commerce Act, sec. 8.

"That in case any common carrier subject to the provisions of this part shall do, cause to be done, or permit to be done any act, matter, or thing in this part prohibited or declared to be unlawful, or shall omit to do any act, matter, or thing in this part required to be done, such common carrier shall be liable to the person or persons injured thereby for the full amount of damages sustained in consequence of any such violation of the provisions of this part, together with a reasonable counsel or attorney's fee, to be fixed by the court in every case of recovery, which attorney's fee shall be taxed and collected as part of the costs in the case."

Interstate Commerce Act, sec. 16(1).

"That if, after hearing on a complaint made as provided in section 13 of this part, the commission shall determine that any party complainant is entitled to an award of damages under the provisions of this part for a violation thereof, the commission shall make an order directing the carrier to pay to the complainant the sum to which he is entitled on or before a day named."

Interstate Commerce Act, sec. 1(4).

"It shall be the duty of every common carrier subject to this part to provide and furnish transportation upon reasonable request therefor, and to establish reasonable through routes with other such carriers, and just and reasonable rates, fares, charges, and classifications applicable thereto; and it shall be the duty of common carriers by railroad subject to this part to establish reasonable through routes with common carriers by water subject to part III, and just and reasonable rates, fares, charges, and classifications applicable thereto. It shall be the duty of every such common carrier establishing through routes to provide reasonable facilities for operating such routes and to make reasonable rules and regulations with respect to their operation, and providing for reasonable compensation to those entitled thereto; and in case of joint rates, fares, or charges, to establish just, reasonable, and equitable divisions thereof, which shall not unduly prefer or prejudice any of such participating carriers."

Interstate Commerce Act, sec. 1(10).

> "The term 'car service' in this part shall include the use, control, supply, movement, distribution, exchange, interchange, and return of locomotives, cars, and other vehicles used in the transportation of property, including special types of equipment, and the supply of trains, by any carrier by railroad subject to this part."

Interstate Commerce Act, sec. 1(13).

> "The Commission is hereby authorized by general or special orders to require all carriers by railroad subject to this part, or any of them, to file with it from time to time their rules and regulations with respect to car service, and the Commis-

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sion may, in its discretion, direct that such rules and regulations shall be incorporated in their schedules showing rates, fares, and charges for transportation, and be subject to any or all of the provisions of this part relating thereto."

Interstate Commerce Act, sec. 1(14)(a).

"The Commission may, after hearing, on a complaint or upon its own initiative without complaint, establish reasonable rules, regulations, and practices with respect to car service by common carriers by railroad subject to this part, including the compensation to be paid and other terms of any contract, agreement, or arrangement for the use of any locomotive, car, or other vehicle not owned by the carrier using it (and whether or not owned by another carrier), and the penalties or other sanctions for nonobservance of such rules, regulations, or practices."

Interstate Commerce Act, sec. 3(4).

"All carriers subject to the provisions of this part shall, according to their respective powers, afford all reasonable, proper, and equal facilities for the interchange of traffic between their respective lines and connecting lines, and for the receiving, forwarding, and delivering of passengers or property to and from connecting lines; and shall not discriminate in their rates, fares, and charges between connecting lines, or unduly prejudice any connecting line in the distribution of traffic that is not specifically routed by the shipper. As used in this paragraph the term 'connecting line' means the connecting line of any carrier subject to the provisions of this part or any common carrier by water subject to part III."

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Interstate Commerce Act, sec. 7.

> "[*As amended August 9, 1935*] [49 U. S. C., §7.] That it shall be unlawful for any common carrier subject to the provisions of this part to enter into any combination, contract, or agreement, expressed or implied, to prevent, by change of time schedule, carriage in different cars, or by other means or devices, the carriage of freights from being continuous from the place of shipment to the place of destination; and no break of bulk, stoppage, or interruption made by such common carrier shall prevent the carriage of freights from being and being treated as one continuous carriage from the place of shipment to the place of destination, unless such break, stoppage, or interruption was made in good faith for some necessary purpose, and without any intent to avoid or unnecessarily interrupt such continuous carriage or to evade any of the provisions of this part."

Interstate Commerce Act, sec. 15(3).

> "The Commission may, and it shall whenever deemed by it to be necessary or desirable in the public interest, after full hearing upon complaint or upon its own initiative without complaint, establish through routes, joint classifications, and joint rates, fares, or charges, applicable to the transportation of passengers or property by carriers subject to this part, or by carriers by railroad subject to this part and common carriers by water subject to part III, or the maxima or minima, or maxima and minima, to be charged, and the divisions of such rates, fares, or charges as hereinafter provided, and the terms and conditions under which such through routes shall be operated. The Commission shall not, how-

> ever, establish any through route, classification, or practice, or any rate, fare, or charge, between street electric passenger railways not engaged in the general business of transporting freight in addition to their passenger and express business, and railroads of a different character. If any tariff or schedule canceling any through route or joint rate, fare, charge, or classification, without the consent of all carriers parties thereto or authorization by the Commission, is suspended by the Commission for investigation, the burden of proof shall be upon the carrier or carriers proposing such cancelation to show that it is consistent with the public interest, without regard to the provisions of paragraph (4) of this section.''

Interstate Commerce Act, sec. 305(b).

> ''It shall be the duty of common carriers by water to establish reasonable through routes with other such carriers and with common carriers by railroad, for the transportation of persons or property, and just and reasonable rates, fares, charges, and classifications applicable thereto, and to provide reasonable facilities for operating such through routes, and to make reasonable rules and regulations with respect to their operation and providing for reasonable compensation to those entitled thereto. Common carriers by water may establish reasonable through routes and rates, fares, charges, and classifications applicable thereto with common carriers by motor vehicle. In the case of joint rates, fares, or charges it shall be the duty of the carriers parties thereto to establish just, reasonable, and equitable divisions thereof, which shall not unduly prefer or prejudice any of such carriers.''

Exhibit C

National Transportation Policy.

"It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act, so administered as to recognize and preserve the inherent advantages of each; to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices; to cooperate with the several States and the duly authorized officials thereof; and to encourage fair wages and equitable working conditions;—all to the end of developing, coordinating, and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense. All of the provisions of this Act shall be administered and enforced with a view to carrying out the above declaration of policy."

Appendix A

Exhibit D

[1]

BEFORE THE

INTERSTATE COMMERCE COMMISSION

Docket No. 31014

The Alabama Great Southern Railroad Company, Atlantic Coast Line Railroad Company, The Baltimore and Ohio Railroad Company, Charleston & Western Carolina Railway Company, The Cincinnati, **New Orleans** and Texas Pacific Railway Company, Erie Railroad Company, Louisville and Nashville Railroad Company, New Orleans & Northeastern Railroad Company, The Pennsylvania Railroad Company, Seaboard Air Line Railroad Company and Southern Railway Company,

Complainants,

vs.

Seatrain Lines, Inc., Central of Georgia Railway Company, Chicago, Rock Island and Pacific Railroad Company, Fort Worth and Denver Railway Company, Missouri-Kansas-Texas Railroad Company of Texas, Missouri Pacific Railroad Company (Guy A. Thompson, Trustee), International - Great Northern Railroad Company (Guy A. Thompson, Trustee), New Orleans and Lower Coast Railroad Company, New York, Susquehanna and Western Railroad Company (Henry K. Norton, Trustee), Texas City Terminal Railway Company, Texas and New Orleans Railroad Company and The Texas and Pacific Railway Company, *et al.*,

Defendants.

Complaint

The complaint of the above-named complainants respectfully shows:

1. Each of the complainants is a corporation and is a common carrier by railroad engaged in the transportation of property in interstate commerce, and is subject to the provisions of the Interstate Commerce Act.

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2. Complainants bring this complaint in behalf of themselves and in the interest of such other railroads as may have a similar interest herein against Seatrain Lines, Inc., and the defendants named in subparagraphs (a), (b), (c) and (d) of paragraph 4 (herein called the "adversary railroad defendants"), and referred to herein together with Seatrain as the "adversary defendants", against whom the principal relief is sought. Complainants also include as formal defendants all of the railroads which have, or might have, through routes with defendant Seatrain Lines, Inc., or which may own cars that might be interchanged with Seatrain. These railroads are listed in "Appendix A" hereto annexed. Complainants are informed and believe that the interests of many of the formal defendants are not adverse, but similar to those of the complainants herein. The formal defendants are joined herein so that the Commission in the exercise of its jurisdiction in respect of the entire subject matter may grant full, appropriate and complete relief.

3. Defendant Seatrain Lines, Inc., hereinafter called Seatrain, is a corporation organized and existing under the laws of the State of Delaware; its function "is essentially that of an intermediate rail carrier; it extends the rails out across the sea"; its name "Seatrain" accurately describes its service as operating railroad train service on the seas. It has been found by the Commission to be a common carrier by water engaged in the transportation of property partly by railroad and partly by water. It is engaged in such transportation between Edgewater, N. J., on the one hand, and Savannah, Ga., Belle Chasse, La. and Texas City, Texas, on the other, and is subject to the Interstate Commerce Act.

4. The adversary railroad defendants are common carriers by railroad engaged in the transportation of property in interstate commerce, and are subject to the provi-

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sions of the Interstate Commerce Act. They include the railroads which connect with Seatrain's four terminals, as follows:

(a) New York, Susquehanna and Western Railroad Company, hereinafter called the Susquehanna, is a corporation organized and existing under the laws of the States of New Jersey and New York, and is a common carrier by railroad subject to the provisions of the Interstate Commerce Act. The Susquehanna is in reorganization proceedings under Section 77 of the Bankruptcy Act, pending in the United States District Court for the District of New Jersey, and Henry K. Norton is the Trustee appointed in those proceedings and is in possession of and operating the properties of the defendant Susquehanna. The tracks of the Susquehanna connect with the car crane of Seatrain at Edgewater, N. J., and the Susquehanna delivers to or receives from Seatrain all of the railroad cars handled by Seatrain at that port.

(b) New Orleans and Lower Coast Railroad Company, hereinafter called the Lower Coast, is a corporation organized and existing under the laws of the State of Louisiana, and is a common carrier by railroad subject to the provisions of the Interstate Commerce Act. The tracks of the Lower Coast connect with the car crane of Seatrain at Belle Chasse, La., and the Lower Coast delivers to or receives from Seatrain all of the railroad cars handled by Seatrain at that port. The Texas and Pacific Railway Company and Texas and New Orleans Railroad Company are common carriers by railroad subject to the provisions of the Interstate Commerce Act, and are corporations organized and existing, respectively, under the laws of the United States and of the State of Texas. Missouri Pacific Railroad Company, hereinafter called the Missouri Pacific, is a corporation organized and existing under the laws of the State of Missouri, and is a common carrier by railroad subject to the provisions of the Interstate Commerce Act. Missouri Pacific is now in proceedings for reorganization under Section 77 of the Bankruptcy Act, pending in the United States District Court for the Eastern District of Missouri, and Guy A. Thompson is the Trustee appointed in those proceedings and is now in possession of and operating the properties of Missouri Pacific. Each of these three defendants last named connects with the Lower Coast and virtually all of the railroad cars delivered to or received from Seatrain by the Lower Coast move over the tracks of one of them. Lower Coast is a subsidiary of the Missouri Pacific Railroad Company and the Missouri Pacific Railroad Company and The Texas and Pacific Railway Company own a substantial part of the stock of Seatrain.

(c) Texas City Terminal Railway Company, hereinafter called Texas City Terminal, is a corporation organized and existing under the laws of the State of Texas, and is a common carrier by railroad subject to the provisions of the Interstate Commerce Act. The tracks of Texas City Terminal connect with the car crane of Seatrain at Texas City, Texas, and over such tracks move all of the railroad cars handled by Seatrain at that port. International-Great Northern Railroad Company, a subsidiary of the Missouri Pacific, Missouri-Kansas-Texas Railroad Company of Texas, Fort Worth and Denver Railway Company, Texas and New Orleans Railroad Company and Chicago, Rock Island and Pacific Railroad Company, are common carriers by railroad subject to the provisions of the Interstate Commerce Act, and each of them is a corporation organized and existing under the laws of the State of Texas, except the last which is organized and exists under the laws of the State of Delaware. The International-Great Northern Railroad Company is now in proceedings

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for reorganization under Section 77 of the Bankruptcy Act, pending in the United States District Court for the Eastern District of Missouri and Guy A. Thompson is the Trustee appointed in those proceedings and is now in possession of and operating the properties of International-Great Northern Railroad Company. Each of these five defendants last named connects with Texas City Terminal and through the facilities of that terminal interchanges cars with Seatrain. The great majority of the railroad cars delivered to or received from Seatrain at Texas City move over the tracks of one of them.

(d) Central of Georgia Railway Company, hereinafter called the Central of Georgia, is a corporation organized and existing under the laws of the State of Georgia, and is a common carrier by railroad subject to the provisions of the Interstate Commerce Act. The tracks of Central of Georgia connect with the car crane of Seatrain at Savannah and Central of Georgia delivers to or receives from Seatrain all of the railroad cars handled by Seatrain at that port.

Background of the Matters Complained Of

5. Seatrain has been in operation for over 20 years. Its operations have produced an unusual number and variety of proceedings before this Commission and of related litigation. Those proceedings are:

(1) *New Orleans and Havana Car Ferry Service,* No. 24119, 188 ICC 371 (1932)—Application of Florida East Coast Railway Company for permission to operate FEC Car Ferry Company service between New Orleans and Havana; opposed by Seatrain.

(2) *Participation of Seatrain Lines in Classification,* I & S 3834, 194 ICC 309 (1933)—Elimination of Seatrain as participating carrier in Southern Classification.

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(3) *Investigation of Seatrain Lines, Inc.*, No. 25565, 195 ICC 215 (1933); 206 ICC 328 (1935)—Investigation on Commission's own motion into status of Seatrain.

(4) *Application of Missouri-Pacific Railroad Company et al.*, No. 25546, 206 ICC 328 (1935); 245 ICC 143 (1941)—Application of Missouri Pacific Railroad Company and The Texas and Pacific Railway Company under Panama Canal Act to determine lawfulness of their stock interest in Seatrain.

(5) *Hoboken Manufacturers Railroad Company* v. *Abilene & S. Railway Company*, Nos. 25728 and 25878, 206 ICC 328 (1935); 237 ICC 97 (1940); 248 ICC 109 (1941); 55 F. Supp. 473; 323 U. S. 612—Car interchange.

(6) *Seatrain Lines, Inc.* v. *Akron, C. & Y. Ry. Co.*, No. 25727, 226 ICC 7 (1938); 243 ICC 199 (1940); 259 ICC 297 (1944)—Through routes and joint rates. The reports in these proceedings also cover: No. 27445, *Agwilines* v. *Seatrain;* No. 27011, *Gulf Refining Co.* v. *Central Railroad of New Jersey;* I & S No. 4542, *Class Rates via Seatrain.*

(7) *Hoboken Manufacturers Railroad Company* v. *Akron C. & Y. Ry. Co.*, No. 27630, 234 ICC 114 (1939); 47 F. Supp. 779; 320 U. S. 368—Divisions between Hoboken Manufacturers Railroad Company, Seatrain's subsidiary, and the railroads.

(8) *Seatrain Lines, Inc., Common Carrier Application* W-543, 250 ICC 816 (1942); 260 ICC 430 (1945); 64 F. Supp. 156; 329 U. S. 424 — Modification of Seatrain certificate.

(9) *West India Fruit & Steamship Co.* v. *Seatrain Lines*, 170 F. 2d 775—Rate-cutting from New Orleans to Havana.

(10) *Seatrain Lines, Inc., Application for Temporary Authority*, No. W-543 (Sub. No. 2), decided Nov. 13, 1951;

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injunction denied, and complaint dismissed, Jan. 9, 1952, *The Alabama Great Southern Railroad Company* v. *United States* (USDC for ED Va.)—Savannah application.

(11) *Class Rate Investigation, 1939,* No. 28300—Ocean-rail rate phase of general investigation pending. Examiner's proposed report issued.

(12) *Pan-Atlantic Steamship Corp., Extension—Houston,* W-376 (Sub. No. 10), decided Aug. 9, 1951—Pan-Atlantic authority into Houston, opposed by Seatrain. Review proceedings of Commission's order pending before United States District Court for Southern District of New York; Seatrain intervening.

(13) *Routing Restrictions via Seatrain Lines, Inc.,* I & S No. 5979, C-30954—Pending, suspension and investigations of announcements of absence of through routes via Seatrain.

(14) *Seatrain Lines, Inc., Application for Permanent Authority,* No. W-543 (Sub. No. 3)—Savannah operations —Hearings assigned.

6. This extended series of piecemeal controversies has produced neither a definitive over-all solution of the relationship between Seatrain and the railroads nor one which in ultimate result is consistent with the provisions of the Interstate Commerce Act.

(a) This Commission has on several occasions left issues for future decision, or invited Seatrain to return to it if dissatisfied. It has done so with respect to through routes, *Investigation of Seatrain Lines, Inc.,* 206 ICC 328, 343, 344, and also with respect to its use of cars, *Seatrain Lines, Inc.* v. *Akron, C. & Y. Ry. Co.,* 226 I. C. C. 7. It has done so with respect to divisions, *Id.* at page 266. It has reserved the terms and conditions of car interchange

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on the Savannah route for future consideration, *Seatrain Lines, Inc., Temporary Authority Application,* W-543 (Sub. No. 2) (Nov. 13, 1951). The Supreme Court has noted "that the Commission has not foreclosed future consideration of the car hire compensation problem", *United States* v. *Pennsylvania R. Co.,* 323 U. S. 612, 624.

(b) Now pending before the Commission are three proceedings involving Seatrain. These include an investigation for the establishment of reasonable class rates on ocean-rail traffic between north Atlantic ports and interior points in eastern seaboard territory, on the one hand, and New Orleans and Baton Rouge, La., and Texas Gulf ports and interior points in the southwest, on the other hand, No. 28300; investigation by the Commission at the instance of Seatrain as to certain notes in tariffs published by certain railroads indicating that there are no through routes with Seatrain via Savannah, Ga., I & S No. 5979 and No. 30954; and finally Seatrain's application to make permanent its authority to establish a Savannah, Ga., service, W-543 (Sub. No. 3), which by reason of fundamental differences from Seatrain's earlier service to the Gulf, such as length of haul and time in transit, the relative volume of break-bulk and non-break-bulk water service, and the competitive significance of these differences, is certain to give rise to wholly new controversies and problems.

(c) Twenty years of piecemeal litigation has failed satisfactorily to resolve the relationship between Seatrain and the railroads. But Seatrain, though invited so to do by the Commission, has not returned to the Commission for consideration of its alleged grievances. Instead it has filed a complaint under the antitrust laws in the United States District Court for the District of New Jersey against 11 railroads, the Association of American Railroads, and six traffic associations and committees. Seatrain asks the United States District Court by permanent injunction to prescribe the use and interchange of freight cars. It asks the court permanently to enjoin the railroads which are defendants in that action from acting to deny any through route, joint rate or division demanded of them by Seatrain; it asks the court to establish contempt sanctions to govern the day-to-day relationship between those railroads and Seatrain; it asks general relief from so-called unfair competitive practices. It prays the Court by injunction, in effect, to write rules for switching charges, per diem payments, bills of lading, and, indeed, all matters pertaining to the Seatrain operation, all of which clearly appear to be within the special competence and exclusive jurisdiction of the Commission. That antitrust action Seatrain has brought in an apparent effort to coerce the railroad defendants there into arrangements satisfactory to Seatrain in these various respects. It has offered dismissal to certain of the defendants in that action who have met or who might meet Seatrain's demands. There is no occasion here to argue the propriety or impropriety of this antitrust action; it is sufficient that the many prior proceedings have not served to clarify the many and difficult problems growing out of fitting "an intermediate rail carrier" which "extends the rails out across the sea" into the transportation system of the country.

(d) Seatrain in that antitrust action asks damages against four of the defendants named therein in the amount of $164,163,000. It has in the past asked reparation of this Commission, and has been denied it, for much the same matters. The complainant railroads, under the allegations of the succeeding paragraphs, would have good ground for demanding reparation for the adversary defendants' violation of the Interstate Commerce Act. Complainants do not, however, now conceive that the problems

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between them and Seatrain can be solved by damages. These continuing problems stem most largely from the fact that the Seatrain type of service as operated is of necessity an integral part of the railroad system of the country, not merely a competing transportation service. What is important is a complete and authoritative determination of all of the problems involving Seatrain's relationship to the national transportation system, which would establish under the Commission's supervision a stable and proper relationship.

7. The complainant railroads have accordingly concluded that the time has come when there ought to be a definitive and over-all solution of these many interrelated problems. It is insufficient, for a long-term solution, merely to establish that the court has neither jurisdiction nor authority to contrive this solution, nor should the railroads continue to await the piecemeal solution of the problems by this Commission in isolated controversies. Instead, it is in the public interest that there be a comprehensive examination or reexamination of all the difficult issues between Seatrain and the railroads. It is in the interest of all that these problems receive authoritative over-all solution. Both Seatrain and the railroads have an obligation, to the public and to this Commission, to obtain resolution of these many issues and thus terminate what would otherwise be an unending controversy. In recognition of that responsibility, the complainant railroads file this comprehensive complaint.

8. This complaint proceeds on the premise that the Commission should recognize that Seatrain has inaugurated and seeks further to expand a novel transportation system which is unlike any other, and is in fact a "rail carrier by water," literally a "Seatrain," which must be

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coordinated with the railroads on a proper and inclusive basis in the light of present conditions. Seatrain has in the past brought this Commission a series of separate issues, whereby it has secured the advantages of a break-bulk water carrier although its service is most nearly that of a rail carrier. It asserts in the antitrust suit that it should be treated, so far as concerns privileges in contrast to obligations, as a rail carrier by land. In truth it is neither, but a rail freight carrier by water and its relations with the railroads should be determined on the merits of its real character and not by false analogy. The result of a series of separate determinations, largely founded on the assumption that Seatrain was in fact the same as a break-bulk water carrier, has been to endow Seatrain with unfair advantages and thereby to establish Seatrain as a direct and active competitor of the all-rail routes on preferential terms. Starting as a one-vessel service between New Orleans, La., and Havana, Cuba, with which there could be no all-rail competition, Seatrain has extended its operations to the point where it now offers six-vessel service between Edgewater, N. J., on the one hand and New Orleans, La., Texas City, Texas, and, most recently, Savannah, Ga., on the other, in all of which Seatrain competes, in effect as a rail carrier, directly with the all-rail services between these points on preferential terms. The complainants ask that the Commission recognize that this service is essentially a rail service, which it is in effect, so far as concerns the competitive and cooperative relations between Seatrain and the railroads, and ask that it be dealt with as such by the Commission from the standpoint of its obligations as well as from the standpoint of its privileges. They further ask that the relations between Seatrain and the railroads be reviewed realistically in the light of the transportation economics which makes largely irrelevant

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the fact that Seatrain's railroad tracks move over water carrying railroad cars with them rather than being built as stationary rails on land with cars moving over them by motive power.

THROUGH ROUTES AND RELATED MATTERS

9. As of the present time there have not been established through routes or joint class rates, joint column rates or joint commodity rates in effect as between points in eastern territory on or via the lines of the Pennsylvania Railroad and certain other railroads and points in southwestern territory, in connection with Seatrain via Edgewater, N. J., and Belle Chasse, La., or Texas City, Texas. On information and belief that in the past, in negotiating with the railroads with respect to the establishment of through routes and joint rates, Seatrain has either refused or failed to agree:

(a) To join in the establishment of rates via Seatrain which would be fair and reasonable in relation to the rates of competing railroads;

(b) To accord the railroads which would participate in such joint rates the just, reasonable and equitable divisions contemplated by law;

(c) To become a subscriber on appropriate terms to the Car Service and Per Diem Agreement, and to furnish its share of freight cars and other facilities for the operation of through routes; or to provide compensation to car-owning railroads reasonable and appropriate to its peculiar use of railroad cars.

Seatrain's refusal or failure so to agree is one of the substantial reasons why through routes and joint rates via Seatrain's service have not been established between points in eastern territory on or via the lines of the Pennsylvania Railroad and certain other railroads and to points in southwestern territory.

To the extent that such through routes are required in the public interest, the absence of reasonable through routes and reasonable and non-prejudicial joint rates subject to reasonable and equitable divisions and appropriate conditions of car use between points in eastern territory on or via the lines of the Pennsylvania Railroad and points in southwestern territory over the lines of Seatrain between Edgewater, N. J., and Belle Chasse, La., or Texas City, Teaxs, will for the future be unjust and unreasonable and unduly prejudicial and inequitable to complainants in violation of Sections 1(4), 3(1), 3(4), 15(3), 15(6), 305(b), 305(c), 305(d), 307(d) and 307(e) of the Act.

10. As of the present time there have not been estabished through routes or joint class rates, joint column rates or joint commodity rates between complainants and Seatrain, or, generally, between points in eastern and southern territories in connection with Seatrain via Edgewater, N. J. and Savannah, Ga. The complainants believe that Seatrain will similarly refuse or fail to agree to the matters set forth in subparagraphs (a) to (c) of paragraph 9 above, in connection with any negotiations for the establishment of through routes or joint rates between points in eastern and southern territories via the Seatrain service between Edgewater, N. J. and Savannah, Ga., under the temporary authority now granted by the Commission or in event the Commission should grant the permanent authority which some of these complainants are now opposing.

To the extent that such through routes are required in the public interest, the absence of reasonable through routes and reasonable and non-prejudicial joint rates subject to reasonable and equitable divisions and appropriate conditions of car use between eastern and southern territories over the lines of Seatrain between Edgewater, N. J. and Savannah, Ga., will for the future—so long as such temporary authority shall continue or if the Commission over the opposition of certain of the complainants shall grant Seatrain permanent operating authority—be unjust and unreasonable and unduly prejudicial and inequitable to complainants, in violation of Sections 1(4), 3(1), 3(4), 15(3), 15(6), 305(b), 305(c), 305(d), 307(d) and 307(e) of the Act.

11. The continuance or establishment of through routes, use of the essential facilities for their operation, and joint rates and divisions without prescribing reasonable terms and conditions in respect thereof applicable to Seatrain is in conflict with Seatrain's obligations under Sections 1(4), 3(4), 305(a) and 305(b) of the Act.

SEATRAIN'S RATES

12. The Commission's decision in Docket No. 25727, et al., *Seatrain Lines, Inc.* v. *Akron C. & Y. Ry. Co.*, 243 ICC 199, was based upon a record which does not reflect present-day conditions. That decision established joint rates with Seatrain on the level of the then existing rates for break-bulk carriers. At that time, Seatrain's proportion of the tonnage handled by common carriers by water operating in the North Atlantic-Gulf service was approximately four per cent while in the post-war years of 1947-1950, its proportion approximated 34 per cent. Of the tonnage moving via the water lines between eastern and southwestern territories, which has a rail haul in either territory, Seatrain's proportion constituted approximately 80 per cent prior to its placing an additional vessel in its New York-Gulf service in 1951 and prior to the suspen-

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sion of the coastwise service of Pan-Atlantic Steamship Corporation.

13. Since November 30, 1951, and at the present time, Seatrain has been and is operating a regularly scheduled service between Edgewater, N. J., and Savannah, Ga., under temporary authority granted by the Commission on November 13, 1951, in Docket No. W-543 (Sub. No. 2). It is the only common carrier by water furnishing regular scheduled ocean service between the ports of New York and Savannah. Formerly, a number of break-bulk water lines operating between New York Harbor and Savannah maintained a differential basis of joint rates with connecting railroads. There are no such break-bulk water lines operating between these points at the present time. The restoration of break-bulk service between these points is improbable because of increased costs. Despite the disappearance of break-bulk service between these points, on which the differential was based, Seatrain now maintains, in connection with the Central of Georgia, a differential basis of rates on carload traffic predicated on break-bulk service as compared with the all-rail service.

14. Seatrain is in fact a direct competitor of all-rail service, taking substantial amounts of traffic which would otherwise move, not by break-bulk carriers, but by the all-rail routes. Seatrain is able to compete against the railroads at an unfair competitive advantage because it offers shippers at substantially lower rates a long-haul traffic service which is substantially equivalent to that offered by the all-rail routes. Both use a freight car for transport without physical transfer of the goods so shipped. There is no significant difference between the two services except that the one is performed on land by rail and the other on water by vessels which carry freight cars owned by rail-

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roads, obtained from the national railroad car supply to which Seatrain has made no contribution of its own.

15. Complainants urge that a complete inquiry into Seatrain's and all-rail costs and services will demonstrate that Seatrain is in substantial measure now unjustifiably subsidized by the railroads. Costs of Seatrain operations now cast upon the railroads should be borne by Seatrain. The proper allocation of these costs will result in more nearly equalizing Seatrain's and the railroads' expenses for substantially equivalent services.

16. The existing rates applicable to movements by Seatrain via Edgewater, N. J., and Savannah, Ga., under the temporary operating authority between points also served by complainants in eastern and southern territories are unjust and unreasonable, in violation of Sections 1 (4), 305(b) or both, and constitute unfair and destructive competitive practices contrary to the national transportation policy declared in the Act.

JOINT RATES

17. For the reasons alleged in paragraphs 12 through 15 above, the existing class and commodity rates applicable to transportation between points in eastern territory and points in the southwestern territory over the lines of Seatrain between Edgewater, N. J., on the one hand, Belle Chasse, La., and Texas City, Texas, on the other, are unjust and unreasonable, in violation of Sections 1 (4) and 305(b), and constitute unfair and destructive competitive practices contrary to the national transportation policy declared in the Act.

18. For the reasons alleged in paragraphs 12 through 15 above, the differential basis of rates now applicable under temporary operating authority between points or

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ports in eastern territory via Seatrain, and points in southern territory through Savannah, Ga., and via Central of Georgia is unjust and unreasonable; and maintenance of that rate basis by Seatrain and its connections is unduly preferential of Seatrain and unduly prejudicial to the railroads operating the all-rail routes between the same points of origin and destination and constitutes unfair and destructive competition contrary to the National transportation policy and contrary to Sections 1(4), 3(1), 305(b), and 305(c) of the Act.

DIVISIONS

19. On all traffic which they interchange with Seatrain, the complainant railroads perform no less service and incur no less expense than they ordinarily perform or incur on similar all-rail traffic handled for like distances and given normal origin and destination terminal services. The railroads should not be required or permitted to subsidize the Seatrain operation by accepting divisions which, in any event, are less than their local rates to or from the ports for like distances.

20. The divisions of such joint rates as have been established in connection with Seatrain between points and ports in eastern territory and points and ports in southern territory via Edgewater, N. J., and Savannah, Ga., so far as they yield to the railroads, in any event, less than their local rates to or from the ports, are unjust, unreasonable, inequitable and unduly prejudicial as to the participating railroads, and are unduly preferential of Seatrain in violation of Sections 1(4), 3(1), 305(b) and 305(c) of the Act.

21. On information and belief complainants allege that the Central of Georgia has joined with Seatrain in certain joint rates which are unreasonably lower than the all-rail

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rates between the same points of origin and destination, and out of which the Central of Georgia accepts too low a division of the total rate. The maintenance and observance of such joint rail-water and water-rail rates and of such divisions thereof by the Central of Georgia are unjust, unreasonable and inequitable, and are unduly prejudicial to complainants, contrary to the provisions of Sections 1(4), 3(4), 305(b), 305(c), and 305(d) of the Act.

CAR SERVICE AND PER DIEM

22. Seatrain now has unrestricted use of all the railroad freight cars which it needs to handle the traffic it can move or is able to obtain. In respect of such use and in respect of wider use, should the Commission determine that Seatrain should have unrestricted access to the entire freight car supply of the country, Seatrain should be required to meet its fair obligations in connection with the use and interchange of freight cars and per diem payments therefor. Its present use of and payment for railroad freight cars is an unjust and unreasonable practice in violation of Sections 1(4), 1(11) and 305(b) of the Interstate Commerce Act, and a preferential and discriminatory practice under Sections 3(4) and 305(d) of that Act.

23. Seatrain and the adversary railroad defendants enumerated in subparagraphs (a), (b), (c) and (d) of paragraph 4, by agreement, relieve Seatrain of responsibility for per diem covering detention of cars held by them for it awaiting its acceptance of such cars or acceptance by its immediately connecting railroads. Under Car Service Rule 15, complainants and all other railroads bear the responsibility for per diem covering the detention of cars which they are unable to receive. The agreement of the adversary defendants above-named in this paragraph constitutes unreasonable rules, regulations or prefer-

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ential and discriminatory practices concerning car service in violation of Sections 1(11) and 3(4) of the Interstate Commerce Act.

24. There has been a car shortage for more than a decade past. In general, and with only minor exceptions, each railroad of the country has attempted to provide a sufficient supply of freight cars to meet loading requirements for the traffic which originates on its line. Seatrain by the nature of its operations originates no traffic. It has over the 20 year period of its operations made no contribution to the freight car supply of the country to compensate for its own extensive use of cars owned by the railroads. It carries therefore none of the substantial risks of car ownership in periods of slack times, and none of the ownership risks of car damage and cost of repair.

25. Roughly 35 per cent of the freight car movement by railroads is empty movement, either toward a loading point or toward the home road. Per diem is paid on foreign cars moving empty. Seatrain by the nature of its terminal-to-terminal operations has no empty movement toward a loading point. By virtue of the traffic control made possible by Seatrain's permit and embargo system, complained of in paragraph 28 of this complaint, and of the tendency of Seatrain's receiving lines to load for even a short rail movement toward home, Seatrain performs in fact no appreciable movement of empty cars.

26. Railroads subscribing to the Car Service and Per Diem Rules must make direct reports of car detention, and direct payments of per diem, to the car-owning lines. They have bound themselves, moreover, to a variety of reciprocal obligations as to the use and interchange of freight cars. Seatrain has assumed no similar obligations, but it demands and has secured the use of railroad freight cars without assuming any correlative obligation. To re-

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quire the railroads to furnish cars to Seatrain for its use on more favorable terms and conditions than are exacted of other railroads subscribers to the Car Service and Per Diem Agreement and Interchange Agreement is unduly prejudicial to such other railroads and preferential of Seatrain under Sections 3(1), 3(4) and 305(c) of the Act.

27. The adversary railroad defendants which connect, directly or through switching lines, with Seatrain have regularly delivered to Seatrain freight cars belonging to railroads which have not consented under Car Service Rule 4 to the use of their cars by Seatrain. In so doing such defendants have established and observed and are observing an unjust and unreasonable practice contrary to the provisions of Section 1(11) of the Act. Seatrain, moreover, has been and is unlawfully taking and converting to its own use in its service cars of certain of these complainants and of other railroads which have not consented to use of their cars in its service. This is an unreasonable and unlawful practice in violation of Sections 305(a) and 305 (d) of the Act.

SEATRAIN'S SELECTIVE CARGO SYSTEM

28. Complainants are informed and believe that Seatrain operates under a system of permits and embargoes in the selection of its cargo. Complainants are informed and believe that Seatrain by use of its system of permits and embargoes gives substantial preference to high-rated and heavy-loading commodities, and to those commodities the transportation of which is least likely to involve a return movement of empty cars. This Commission has recognized the existence of this Seatrain cargo selectivity system in *Pan-Atlantic Steamship Corp., Extension—Houston,* W-376 (Sub. No. 10), decided Aug. 9, 1951,

285 ICC 33, 45-46, 48-49. The result of this selective cargo system is a violation of Seatrain's obligation as a common carrier, contrary to Sections 305(a) and 305(c) of the Interstate Commerce Act, and an unfair and destructive competitive practice, prejudicial to the railroads.

RELATION OF MATTERS COMPLAINED OF TO PAST AND PENDING PROCEEDINGS

29. By reason of the several matters complained of herein, Seatrain and certain of the adversary railroad defendants have been able, and, unless the relief herein prayed for is granted, will continue to be able to obtain preferential and unlawful advantages over the railroads with which they compete, including the complainants herein, which said advantages have enabled them, and, so long as such advantages exist, will continue to enable them to indulge in unfair, unlawful and destructive competitive practices, which have deprived and will continue to deprive the complainants and other railroads similarly situated of traffic and revenue, to the damage of the complainant railroads. The result has been that Seatrain has for years been able to operate and unfairly compete with complainant railroads and other railroads similarly situated by virtue of what is in effect a subsidy from these railroads resulting from the illegal, preferential, and destructive competitive practices in which Seatrain has engaged as hereinbefore alleged. Before any further authorities for operation are granted to Seatrain or are made permanent, it is imperative in the public interest and in furtherance of the national transportation policy that the Commission review the entire relationship to the railroads of operations of the type engaged in by Seatrain and the effect thereof upon the railroads, including a re-examination of the questions dealt with in the aforesaid prior proceedings before this Com-

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mission, and for the Commission to reappraise the entire situation in the light of existing and prospective conditions inherent in the expansion and further development of the Seatrain type of service.

30. Seatrain and certain of the adversary railroad defendants acting in concert have, during the period since the beginning of Seatrain operations in 1932, interrupted only by exigencies arising from World War II, conceived and initiated a plan or course of action whereby Seatrain in combination with such railroads has sought and seeks to obtain by successive steps or stages the opportunity and right to engage in the operation of transportation service by water substantially similar to the type of transportation service furnished by railroads operating on land, without assuming corresponding obligations and on a destructive competitive basis, unduly preferential of Seatrain and certain of the adversary railroad defendants so situated as to reap advantage from their connections with Seatrain. Seatrain and such adversary railroad defendants have planned and in pursuance of such plan have acted to obtain an unfair, unjust and unreasonable competitive advantage over the complainant railroads, through the establishment of unlawful, prejudicial and discriminatory through routes, joint rates and divisions for a like service and distance as that furnished by all rail routes.

31. Some of the matters herein complained of have been dealt with singly and in isolation from the other issues, by the Commission in one or more of the proceedings listed in paragraph 5 hereof. Some of these issues are now before the Commission in the pending proceedings listed in paragraph 6(b) hereof. Others, such as Seatrain's selective cargo system and its avoidance of ordinary car service obligations, have never been directly and completely considered by this Commission. As alleged

above, complainants believe the time has come for a comprehensive examination and definitive resolution of all the many issues which after two decades still impair the relations between Seatrain and the railroads, and that no further decisions should be made by this Commission with respect to isolated phases of the problem presented by Seatrain until such comprehensive investigation has been made in accordance with the allegations and prayers contained in this complaint "* * * all to the end of developing, coordinating, and preserving a national transportation system * * * adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense."

Prayer for Relief

Wherefore, complainants respectfully pray that the defendants be served with copies of this complaint and be severally required to answer the same and that, after due hearing and investigation, an order be made:

(1) Commanding said adversary defendants and each of them to cease and desist from the aforesaid violations of the Interstate Commerce Act;

(2) Prescribing, if the Commission should grant Seatrain, over the opposition of some of these complainants, permanent authority to operate between Edgewater, N. J., and Savannah, Ga., such reasonable through routes as may be found necessary or desirable, in the public interest, pursuant to Section 15(3), between points in eastern and southern territories over the lines of complainants and defendants, including Seatrain, via Edgewater, N. J., and Savannah, Ga.;

(3) Prescribing the establishment of such reasonable through routes between points in southwestern territory and points in eastern territory on and over the lines of

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the Pennsylvania Railroad and certain other eastern railroads, and Seatrain via Edgewater, N. J., Belle Chasse, La., and Texas City, Texas, as may be found necessary or desirable, in the public interest, pursuant to Section 15(3);

(4) Requiring Seatrain to provide reasonable facilities for operating such through routes as may be in existence or prescribed, now or hereafter, including an equitable portion of the cars attributable and appropriate to its use, or in the alternative, requiring Seatrain to pay a per diem rate which shall fully reflect its peculiar and unusual character and type of car use;

(5) Fixing reasonable rules and regulations to be observed by Seatrain in the operation of such through routes;

(6) Fixing reasonable terms and conditions under which such through routes shall be operated and all terms and conditions of car use to be observed by Seatrain, including the compensation to be paid by Seatrain for its use of railroad cars, and the manner and method of payment;

(7) Prescribing just and reasonable rates for the movement of freight via Seatrain over the routes hereinabove referred to, giving due consideration to Seatrain's function as an "intermediate rail carrier" which "extends the rails out across the sea", and to its position as a direct competitor of the railroads;

(8) Prescribing, if the Commission, over the opposition of some of these complainants, should grant Seatrain permanent authority to operate between Edgewater, N. J., and Savannah, Ga., reasonable joint rail-water, water-rail and rail-water-rail class rates and commodity rates between all points on the lines of complainants and defendants in eastern and southern territories in connection with Seatrain via Edgewater, N. J., and Savannah, Ga., over

such through routes as may be found necessary or desirable, in the public interest, pursuant to Section 15(3).

(9) Requiring the establishment of reasonable joint rail-water, water-rail and rail-water-rail class rates and commodity rates between all points in eastern territory and points in southwestern territory in connection with Seatrain via Edgewater, N. J., Belle Chasse, La., and Texas City, Texas.

(10) Prescribing just, reasonable and equitable divisions effective as of the date of establishment of the joint rates herein asked to be prescribed, and which will accord the participating railroads divisions which shall not in any event be less than their local rates to or from the ports;

(11) Requiring the Central of Georgia and Seatrain to cease and desist from maintaining their present prejudicial basis of divisions of existing joint rates, and to establish and maintain divisions of joint rates which shall accord the Central of Georgia and other participating railroads divisions which shall not in any event be less than their local rates to or from Savannah, Ga.;

(12) Requiring Seatrain to cease and desist from its use of railroad-owned freight cars except upon reasonable terms and conditions of interchange and use and except on condition that it furnish as its contribution to the national car supply the number of cars appropriate to its use of cars;

(13) Requiring all defendant railroads to cease and desist from delivering to Seatrain railroad-owned cars except upon reasonable and non-discriminatory and non-prejudicial terms and conditions of interchange and use; and

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(14) For such other and further relief as the Commission may consider proper in the premises.

Respectfully submitted,

CHARLES T. ABELES
....
Charles T. Abeles

SIDNEY S. ALDERMAN
....
Sidney S. Alderman

JAMES A. BISTLINE
....
James A. Bistline

R. E. BROWNE, III
....
R. E. Browne, III

E. H. BURGESS
....
E. H. Burgess

W. R. C. COCKE
....
W. R. C. Cocke

JOHN DICKINSON
....
John Dickinson

JOSEPH F. ESHELMAN
....
Joseph F. Eshelman

HAROLD J. GALLAGHER
....
Harold J. Gallagher

WARNER W. GARDNER
....
Warner W. Gardner

W. L. GRUBBS
....
W. L. Grubbs

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RICHARD B. GWATHMEY

....

Richard B. Gwathmey

CHARLES COOK HOWELL

....

Charles Cook Howell

L. JAMES HUEGEL

....

L. James Huegel

H. T. LIVELY

....

H. T. Lively

JAMES B. MCDONOUGH, JR.

....

James B. McDonough, Jr.

W. T. PIERSON

....

W. T. Pierson

HENRY L. WALKER

....

Henry L. Walker

HUGH B. COX

....

Hugh B. Cox

FRANCIS M. SHEA

....

Francis M. Shea

Counsel for Complainants
734 Fifteenth Street, N. W.
Washington 5, D. C.

Dated: March 26, 1952.

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Aberdeen and Rockfish Railroad Company.
Abilene & Southern Railway Company.
The Akron, Canton & Youngstown Railroad Company.
Alabama Central Railroad Company.
Alabama, Tennessee and Northern Railroad Company.
Albany and Northern Railway Company.
Alexander Railroad Company.
Algers, Winslow and Western Railway Company.
Aliquippa and Southern Railroad Company.
Alton and Southern Railroad.
Angelina & Neches River Railroad Company.
The Ann Arbor Railroad Company.
Apalachiocola Northern Railroad Company.
Arcade and Attica Railroad Corporation.
Arkansas & Louisiana Missouri Railway Company.
Arkansas Railroad Company.
The Arkansas Western Railway Company.
Aroostook Valley Railroad Company.
Artemus-Jellico Railroad Company.
Asherton and Gulf Railway Company
(Guy A. Thompson, Trustee).
Ashley, Drew & Northern Railway Company.
Asphalt Belt Railway Company.
(Guy A. Thompson, Trustee).
The Atchison, Topeka and Santa Fe Railway Company.
Atlanta & Saint Andrews Bay Railway Company.
Atlanta and West Point Rail Road Company.
The Atlantic and Danville Railway Company.
Atlantic and East Carolina Railway Company.
Atantic and Western Railway Company.
Augusta Railroad Company.

Baltimore and Eastern Railroad Company.
Bangor and Aroostook Railroad Company.
Barre and Chelsea Railroad Company.
Bath and Hammondsport Railroad Company.
Bauxite & Northern Railway Company.
Beaufort and Morehead Railroad Company.
(A. T. Leary, Lessee).

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The Beaumont, Sour Lake & Western Railway Company. (Guy A. Thompson, Trustee).
Beaver, Meade and Englewood Railroad Company.
Belfast and Moosehead Lake Railroad Company.
Bellefonte Central Railroad Company.
Benwood and Wheeling Connecting Railway Company.
Bessemer and Lake Erie Railroad Company.
Bevier & Southern Railroad Company.
Birmingham & Southeastern Railroad Company.
Birmingham Southern Railroad Company.
Black Mountain Railway Company.
Bonhomie and Hattiesburg Southern Railroad Company.
Boston and Maine Railroad.
Bowdoin Railroad and Transportation Company.
Boyne City Railroad Company.
Brimstone Railroad Company.
Brooklyn Eastern District Terminal.
Broward County Port Authority.
The Buffalo Creek & Gauley Railroad Company.
Bush Terminal Railroad Company.
Butte, Ananconda & Pacific Railway Company.
Cadiz Railroad Company.
Cambria and Indiana Railroad Company.
Campbell's Creek Railroad Company.
Canton & Carthage Railroad Company.
Canton Railroad Company.
Cape Fear Railways, Inc.
Carolina and Northwestern Railway Company.
Carolina, Clinchfield and Ohio Railway
    Carolina, Clinchfield and Ohio Railway of South Carolina, Lessees:
    Atlantic Coast Line Railroad Company.
    Louisville and Nashville Railroad Company.
The Carolina Southern Railway Company.
Carolina Western Railroad.
The Carrollton Railroad.
Cassville & Exeter Railway Company.

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The Castleman River Railroad Company.
Cedar Rapids and Iowa City Railway Company.
Central Indiana Railway Company.
The Central Railroad Company of New Jersey.
Central Railroad Company of Pennsylvania.
Central Vermont Railway, Inc.
Charles City Western Railway Company.
Chattahoochee Valley Railway Company.
The Chesapeake and Ohio Railway Company.
Chesapeake Western Railway.
Chestnut Ridge Railway Company.
Cheswick and Harmar Railroad Company.
Chicago and Eastern Illinois Railroad Company.
Chicago & Illinois Midland Railway Company.
Chicago & Illinois Western Railroad.
Chicago and North Western Railway Company.
Chicago Aurora and Elgin Railway Company.
Chicago, Burlington & Quincy Railroad Company.
Chicago Great Western Railway Company.
Chicago, Indianapolis and Louisville Railway Company.
Chicago, Milwaukee, St. Paul and Pacific Railroad Company.
Chicago North Shore and Milwaukee Railway Company.
Chicago, Saint Paul, Minneapolis and Omaha Railway Company.
Chicago South Shore and South Bend Railroad.
The Clarendon and Pittsford Railroad Company.
Cliffside Railroad Company.
Columbia & Millstadt Railroad Company.
Columbia, Newberry and Laurens Railroad Company.
Columbus and Greenville Railway Company.
Conemaugh & Black Lick Railroad Company.
Cooper Range Railroad Company.
Cornwall Railroad Company.
Coudersport and Port Allegany Railroad Company.
Cumberland and Pennsylvania Railroad Company.
Cumberland Railway & Coal Company.
The Cuyahoga Valley Railway Company.

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APPENDIX A

The Dansville and Mount Morris Railroad Company.
Dardanelle & Russellville Railroad Company.
The Delaware and Hudson Railroad Corporation.
The Delaware, Lackawanna and Western Railroad Company.
Delray Connecting Railroad Company.
Delta Valley & Southern Railway Company.
The Denison and Pacific Suburban Railway Company.
The Denver and Rio Grande Western Railroad Company.
DeQueen and Eastern Railroad Company.
Detroit and Mackinac Railway Company.
The Detroit and Toledo Shore Line Railroad Company.
Detroit, Toledo and Ironton Railroad Company.
Doniphan, Kensett & Searcy Railway.
Donbra Southern Railroad Company.
Duluth & Northeastern Railroad Company.
Duluth, Missabe and Iron Range Railway Company.
The Duluth, South Shore and Atlantic Railroad Company.
Durham and Southern Railway Company.

East Carolina Railway.
East Jersey Railroad and Terminal Company.
East Tennessee and Western North Carolina Railroad Company.
Edgmoor and Manetta Railway.
El Dorado and Wesson Railway Company.
Elgin, Joliet and Eastern Railway Company.
El Paso Southern Railway Company.
Emory River Railroad Company.
Escanaba and Lake Superior Railroad Company.
Etna and Montrose Railroad Company.

The Fairport, Painesville and Eastern Railroad Company.
The Federal Valley Railroad Company.
Ferdinand Railroad Company.
Fernwood, Columbia & Gulf Railroad Company.
Flemingsburg and Northern Railroad Company.
Florida East Coast Railway Company.
(Scott M. Loftin and John W. Martin, Trustees).
Fonda, Johnstown and Gloversville Railroad Company.

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APPENDIX A

Fordyce and Princeton R. R. Co.
Fort Myers and Southern Railroad Company.
Fort Smith and Van Buren Railway Company.
Fort Smith, Subiaco & Rock Island Railroad Company.
Frankfort & Cincinnati Railroad Company.
Franklin & Carolina Railroad.

Gainesville Midland Railroad Company.
Galveston, Houston and Henderson Railroad Company.
Genesee and Wyoming Railroad Company.
Georgia & Florida Railroad
  (Alfred W. Jones, Receiver).
Georgia, Ashburn, Sylvester & Camilla Railway Company.
The Georgia Northern Railway Company.
Georgia Rail Road & Banking Company
  Operated as the Georgia Railroad by lessees:
  Atlantic Coast Line Railroad Company
  Louisville and Nashville Railroad Company.
Georgia Southern and Florida Railway Company.
Grafton and Upton Railroad Company.
Graham County Railroad Company.
Grand Trunk Railway System.
  (Lines in the United States, east of the west bank of the Detroit and St. Clair Rivers) comprising the following carriers:
  Canadian National Railway Company.
  The Champlain and St. Lawrence Railroad Company (Canadian National Railway Company, Lessee).
  The United States and Canada Rail Road Company (Canadian National Railway Company, Lessee).
Grand Trunk Western Railroad Company.
Grassee River Railroad Corporation.
Graysonia, Nashville & Ashdown Railroad Company.
Great Northern Railway Company.

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Green Bay and Western Railroad Company.
Greenville and Northern Railway Company.
Greenwich & Johnsonville Railway Company.
Gulf, Colorado and Santa Fe Railway Company.
Gulf, Mobile and Ohio Railroad Company.

Hampton & Branchville Railroad Company.
Hannibal Connecting Railroad Company.
Harriman and Northeastern Railroad Company.
Hartwell Railway Company.
Helena Southwestern Railroad Company.
High Point, Thomasville & Denton Railroad Company.
Hooppole, Yorktown and Tampico Railroad Company.
Houston and Brazos Valley Railway Company.
(Guy A. Thompson, Trustee).
The Huntington and Broad Top Mountain Railroad and Coal Company.

Illinois Central Railroad Company.
Illinois Terminal Railroad Company.
Interstate Railroad Company.
The Ironton Railroad Company
(Lehigh Valley Railroad Company and Reading Company, Lessees).

The Jay Street Connecting Railroad.
Johnstown and Stony Creek Rail Road Company.

The Kanawha Central Railway Company.
The Kansas City Southern Railway Company.
Kansas, Oklahoma & Gulf Railway Company.
Kelley's Creek and Northwestern Railroad Company.
Kelly's Creek Railroad Company.
Kentucky & Indiana Terminal Railroad Company.
Kentucky and Tennessee Railway.
Kewaunee, Green Bay and Western Railroad Company.

Lackawanna and Wyoming Valley Railroad Company
(E. McLain Watters, Trustee).
Lake Champlain and Moriah Rail Road Company.

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The Lake Erie and Eastern Railroad Company.
The Lake Erie and Fort Wayne Railroad Company.
The Lake Erie and Northern Railway Company.
Lake Erie, Franklin & Clarion Railroad Company.
Lakeland Railway.
The Lake Terminal Railroad Company.
Lake Transfer Company—Harry C. Harris, an individual doing business as Lancaster and Chester Railway Company.
The La Salle and Bureau County Railroad Company.
Laurinburg and Southern Railroad Company.
The Lehigh and Hudson River Railway Company.
Lehigh and New England Railroad Company.
Lehigh Valley Railroad Company.
Lehigh Valley Transit Company.
Ligonier Valley Rail Road Company.
Litchfield and Madison Railway Company.
Live Oak, Perry & Gulf Railroad Company.
The Long Island Rail Road Company (William Wyer, Trustee).
Longview, Portland & Northern Railway Company.
The Lorain & West Virginia Railway Company.
Louisiana & Arkansas Railway Company.
The Louisiana and North West Railroad Company.
The Louisiana & Pine Bluff Railway Company.
Louisiana Midland Railway Company.
Louisiana Southern Railway Company.
Louisville and Wadley Railroad Company.
Louisville, New Albany & Corydon Railroad Company.
The Louisville and Beaver River Railroad Company.
Macon, Dublin & Savannah Railroad Company.
Maine Central Railroad Company.
Manistee and Northeastern Railway Company.
Manistique and Lake Superior Railroad Company.
The Mansfield Railway & Transportation Company.
Manufacturers Railway Company.
The Marcellus and Otisco Company, Inc.

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The Marianna & Blountstown Railroad Company.
Maryland and Pennsylvania Railroad Company.
McCloud River Railroad Company.
McKeesport Connecting Railroad Company.
Meridian and Bigbee River Railway Company (J. C. Floyd, Trustee).
Middle Fork Railroad Company.
Middletown and New Jersey Railway Company, Inc.
Midland Valley Railroad Company.
Milstead Railroad Company.
The Minneapolis & St. Louis Railway Company.
Minneapolis, St. Paul & Sault Ste. Marie Railroad Company.
Mississippi & Skuna Valley Railroad Company.
Mississippian Railway.
Mississippi Central Railroad Company.
Missouri and Arkansas Railway Company (C. C. Alexander, W. S. Walker and J. B. Lambert, Receivers).
Missouri-Illinois Railroad Company.
Missouri-Kansas-Texas Railroad Company.
Missouri Pacific Railroad Corporation in Nebraska (Guy A. Thompson, Trustee).
The Mobile & Gulf Railroad Company.
The Monongahela Railway Company.
Montana, Wyoming & Southern Railroad Company.
Montour Railroad Company.
Morehead and North Fork Railroad Company.
Morristown & Erie Railroad Company.
Moscow, Camden & San Augustine Railroad.
Moshassuck Valley Railroad Company.
Mount Hope Mineral Railroad Company.
Muncie and Western Railroad Company.
Municipal Docks Railway
(City of Jacksonville, Florida).
The Murfreesboro and Nashville Railroad Company.

The Nacogdoches & Southern Railroad Company.
The Narragansett Pier Railroad Company.

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APPENDIX A

The Nashville, Chattanooga & St. Louis Railway.
Natchez & Southern Railway Company
(Guy A. Thompson, Trustee).
The Natchez, Urania and Ruston Railway Company.
Nelson & Albemarle Railway Company.
The Newburgh and South Shore Railway Company.
The New Haven and Dunbar Railroad Company.
New Iberia & Northern Railroad Company.
(Guy A. Thompson, Trustee).
The New Jersey and New York Railroad Company
(Peter Duryee, Trustee).
New Jersey, Indiana & Illinois Railroad Company.
New Orleans Public Belt Railroad.
New Orleans Terminal Company.
New Orleans, Texas & Mexico Railway Company
(Guy A. Thompson, Trustee).
The New York and Long Branch Railroad Company.
The New York Central Railroad Company.
The New York, Chicago and St. Louis Railroad Company.
New York Dock Railway.
The New York, New Haven and Hartford Railroad Company.
New York, Ontario and Western Railway Company
(Raymond L. Gebhardt and Ferdinand J. Sieghardt, Trustees).
Nicholas, Fayette and Greenbrier Railroad Company
(The Chesapeake and Ohio Railway Company and The New York Central Railroad Company, Lessees).
Norfolk and Western Railway Company.
Norfolk Southern Railway Company.
Northampton and Bath Railroad Company.
Northeast Oklahoma Railroad Company.
Northern Pacific Railway Company.
North Louisiana & Gulf Railroad Company.
Northwestern Pacific Railroad Company.
Norwood & St. Lawrence Railroad Company.

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Oklahoma City-Ada-Atoka Railway Company.
Okmulgee Northern Railway Company.
Oneida & Western Railroad Company.
The Orange & Northwestern Railroad Company (Guy A. Thompson, Trustee).
Oregon Trunk Railway.
Osage Railway Company.
The Owasco River Railway.

Pacific Electric Railway Company.
Panhandle and Santa Fe Railway Company.
Paris and Mt. Pleasant Railroad Co.
Patapsco & Back Rivers Railroad Company.
Pearl River Valley Railroad Company.
The Pecos Valley Southern Railway Company.
Pennsylvania and Atlantic Railroad Company.
Pennsylvania and Atlantic Railroad Company (South of Hightstown, N. J., to Pemberton, N. J., Inc.) (The Union Transportation Company, Lessee).
Pennsylvania-Reading Seashore Lines.
Pickens Railroad Company.
Piedmont and Northern Railway Company.
The Pioneer and Fayette Railroad Company.
The Pittsburg & Shawmut Railroad Company.
Pittsburgh, Allegheny & McKees Rocks Railroad Company.
The Pittsburgh and Lake Erie Railroad Company.
Pittsburgh and Ohio Valley Railway Company.
The Pittsburgh & West Virginia Railway Company.
Pittsburgh, Chartiers & Youghiogheny Railway Company.
Point Comfort & Northern Railway Company.
Port Angeles Western Railroad Company.
Prattsburgh Railway Corporation.
The Prescott and Northwestern Railroad Company.
The Preston Railroad Company.

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Quanah, Acme & Pacific Railway Company.

Rahway Valley Company (Rahway Valley Company, Lessee).
Raritan River Rail Road Company.
Reading Company.
Richmond, Fredericksburg and Potomac Railroad Company.
Rio Grande City Railway Company (Guy A. Thompson, Trustee).
The Rio Grande Southern Railroad Company (Pierpont Fuller, Jr., Receiver).
The River Terminal Railway Company.
Rockingham Railroad Company.
Rock Island Southern Railway Co.
Roscoe, Snyder and Pacific Railway Company.
Rosslyn Connecting Railroad Company.
Rutland Railway Corporation.

St. Johnsbury & Lamoille County Railroad.
St. Johns River Terminal Company.
St. Louis & Troy Railroad Company.
The St. Louis, Brownsville and Mexico Railway Company. (Guy A. Thompson, Trustee).
St. Louis-San Francisco Railway Company.
St. Louis, San Francisco and Texas Railway Company.
St. Louis Southwestern Railway Company.
St. Louis Southwestern Railway Company of Texas.
St. Marys Railroad Company.
San Antonio Southern Railway Company (Guy A. Thompson, Trustee).
San Antonio, Uvalde & Gulf Railroad Company (Guy A. Thompson, Trustee).
San Benito and Rio Grande Valley Railway Company (Guy A. Thompson, Trustee).
Sandersville Railroad Company.
San Diego Arizona Eastern Railway Company.
Sand Springs Railway Company.
Sanford and Eastern Railroad Corporation.

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Saratoga & Schuylerville Railroad Corporation.
Savannah & Atlanta Railway Company.
Savannah River Terminal Company.
Smoky Mountain Railroad
(J. E. Temple, Receiver).
South Brooklyn Railway Company.
South Buffalo Railway Company.
Southern Indiana Railway, Inc.
Southern New York Railway, Incorporated.
Southern Pacific Company.
The South Georgia Railway Company.
Spokane, Portland and Seattle Railway Company.
Springfield Terminal Railway Company (Vermont).
The Stewartstown Railroad Company.
Suncook Valley Railroad.
Sylvania Central Railway Company.

Talbotton Railroad Company.
Tallulah Falls Railway Company
(H. L. Brewer, Receiver).
Tavares and Gulf Railroad Company.
Tennessee, Alabama & Georgia Railway Company.
Tennessee Central Railway Company.
Tennessee Railroad Company.
Terminal Railway, Alabama State Docks.
Texas & Northern Railway Company.
The Texas Mexican Railway Company.
Texas-New Mexico Railway Company.
Texas, Oklahoma & Eastern Railroad Company.
Texas Pacific-Missouri Pacific Terminal Railroad of New Orleans.
Texas Short Line Railway Company.
Texas South-Eastern Railroad Company.
Texas Transportation Company.
Tidewater Southern Railway Company.
The Toledo and Eastern Railroad Company.
The Toledo, Angola & Western Railway Company.
Toledo, Peoria & Western Railroad.
The Toledo Terminal Railroad Company.
Trans Florida Central Railroad Company.

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Tremont & Gulf Railway Company.
Trenton-Princeton Traction Company.
The Troy Union Railroad Company.
Tulsa-Sapulpa Union Railway Company.
The Tuskegee Railroad Company.

Unadila Valley Railway Company.
Union Pacific Railroad Company.
The United States and Canada Rail Road Company (Canadian National Railway Company, Lessee).
Unity Railways Company.
Upper Merion and Plymouth Railroad Company.
Utah Railway Company.

Valley Railroad Company (of Pa.).
Virginia and Carolina Southern Railroad Company.
Virginia Blue Ridge Railway.
Virginia Central Railway.
Virginia Railway Company.

Wabash Ralroad Company.
Waco, Beaumont, Trinity & Sabine Railway Company. (T. L. Epperson, Receiver).
Wadley Southern Railway Company.
Ware Shoals Railroad Company.
Warren & Ouachita Valley Railway Company.
Warren & Saline River Railroad Company.
Warrenton Rail Road Company.
Washington and Old Dominion Railroad.
Waterloo, Cedar Falls & Northern Railroad.
Waynesburg and Washington Railroad Company
The Weatherford, Mineral Wells and Northwestern Railway Company.
Western Allegheny Railroad Company.
Western Maryland Railway Company.
The Western Pacific Railroad Company.
The Western Railway of Alabama.
West Pittston-Exeter Railroad Company.
West Virginia Northern Railroad Company.
Wharton and Northern Railroad Company.
Wichita Falls & Southern Railroad Company.

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APPENDIX A

The Wichita Union Terminal Railway Company.
The Wichita Valley Railway Company.
Winchester and Western Railroad Company.
The Winfield Railroad Company.
Winifrede Railroad Company.
Winston-Salem Southbound Railway Company.
Winston-Salem Terminal Company.
Wrightsville and Tennille Railroad Company.

The Youngstown and Northern Railroad Company.
Youngstown & Southern Railway Company.

Exhibit E

PENNSYLVANIA RAILROAD

December 26, 1934.

Mr. D. T. Lawrence:

Referring to your joint letter of October 31, advising of my appointment on special committee of traffic Vice Presidents to study and report to the President as to certain phases of Seatrain Lines situation which was discussed by the special committee on November 23rd, and as it was not possible to reach unanimous conclusions the following is submitted as my report.

As the method of handling traffic in connection with Seatrain Lines is generally understood, it does not appear necessary to recite the details. There are no through rates effective in connection with Seatrain Lines, the traffic being handled on basis of combination to or from Hoboken. Seatrain Lines, Inc. is seeking joint through rates with rail carriers in Official territory to the same extent and on the same level as are published in connection with non-break-bulk coastwise steamship lines. The rates of the break-bulk routes are on a differential basis—a differential rate is, of course, one that is lower than applicable between the same points via the standard all-rail route and is predicated upon the theory that the service rendered via such differential routes is inferior to that available via the standard all-rail route. It is this (lower) break-bulk differential basis of rates which Seatrain Lines proposes to operate jointly with the rail-carriers. The issuance of through bills of lading on domestic traffic and the cancellation of the restrictions against the use of railroad cars on vessels of Seatrain Lines is also sought.

The status of Seatrain Lines, Inc. is involved in several pending cases before the I. C. C. While it was found in Docket 25565 (195 ICC 215) in effect that Seatrain Lines,

Exhibit E

Inc. is not a common carrier by rail, this case has been re-opened and the following cases are now pending:

ICC Docket 25546. Application of the Missouri Pacific and Texas & Pacific under Panama Canal Act to retain an interest in Seatrain Lines in connection with which report of the Examiner has been issued, which in substance recommends approval of the application. While the Eastern lines have not objected, it is their contention that approval of the application will make Seatrain Lines subject to the Commission's jurisdiction as to minimum and maximum rates.

ICC Docket 25727. Seatrain Lines, Inc. vs. Railroads. Complaint of Seatrain Lines seeking joint rates, etc.

ICC Docket 25728 and 25878. Hoboken Manufacturers Railroad vs. Railroads and New Orleans & Lower Coast Railroad vs. Railroads. In these cases the car service rules are attacked and the Examiner recommends that the Commission has no jurisdiction, but if so the rules complained of are not unreasonable.

U. S. District Court for Southern District of New York —New York Central Railroad Co., et al vs. Seatrain Lines and Hoboken Manufacturers Railroad. In this case the Eastern rail carriers seek to enjoin the Hoboken Manufacturers Railroad Co. and Seatrain Lines, Inc. from using their cars in Seatrain Lines service.

Thus it will be seen that practically the entire question of the status of this service is still undetermined. It is our position that the request of Seatrain Lines should be denied for the following reasons:

1. The service is essentially that of an all-rail carrier.

A. The traffic is transported through from origin to destination in the box (or tank) cars and obviates the necessity of transfer from car to ship and vice versa.

Exhibit E

B. The time in transit between New York (Hoboken) and New Orleans is but slightly greater than that of the all rail routes, and were the stop at Havana eliminated undoubtedly equal or possibly be slightly faster than the all rail service.

C. The economies and savings resulting from the use of the box car as against the break-bulk route are present. In some cases the use of containers for the loading is eliminated and in practically all cases the shipper finds it possible to accomplish material saving in packing requirements necessary to withstand the transfer via the break-bulk routes.

D. In fact, for certain classes of traffic at least, Seatrain Lines service would appear superior to that of the all-rail routes, eliminating as it does transportation shocks incident to yarding of cars, stopping and starting of trans, passing over thousands of crossovers, etc.

E. Seatrain Lines transport not only the actual freight or lading but the car in which the freight is loaded. In other words, Seatrain operation utilizes the car as the container for the lading, transporting both lading and car containing the lading as contrasted to the handling of the lading alone over the water portion of the break-bulk routes.

F. The same necessity is present for empty return movement of special equipment, such as tank cars, etc. as exists via the all-rail routes.

2. The service is superior to that of the break-bulk routes.

Of course, all that is said in the preceding paragraph establishing Seatrain Lines service as that of an all-rail route is equally applicable in demonstrating that it is superior to that of the break-bulk routes. The Examiner's report in ICC Docket 25565 clearly portrays this situation.

Exhibit E

It can readily be seen that if Seatrain Lines' rates are on a break-bulk differential basis then the coastwise break-bulk water lines would strive for a still lower basis, so that instead of being confronted with a single form and basis of differential service the all-rail routes will have to contend with two such competitive services; that is, Seatrain service, enjoying differential rates while essentially an all-rail service, and the present break-bulk service but at rates materially lower than at present obtaining. The competition with the all rail services would therefore be vastly increased by

1. The excellent service of Seatrain Lines at differential rates

and

2. The lower rates applicable via the break-bulk routes.

It must be borne in mind that Seatrain Lines compete not only with the all-rail routes but with the break-bulk routes as well, and the latter lines have announced that in order to retain what they consider their fair share of the traffic that their rates will be further reduced. Therefore, for the all-rail lines to retain any portion whatever of the business the conclusion seems inevitable that:

3. Reduction in all-rail rates and revenues would follow.

4. Private car movements—The somewhat longer route via Havana of Seatrain Lines would result in greater mileage allowance for movement of privately owned cars than via the all-rail routes, provided Seatrain Lines made only the same per mile allowance as do the rail lines. It is interesting to note that in ICC Docket 24419 (188-ICC-377) it is stated that Overseas Railway, Inc. (predecessor of Seatrain Lines, Inc.) pay a mileage allowance of approximately 5 cents per statute mile of loaded ocean transportation per tank car from New Orleans to Havana.

Exhibit E

Further, the wear and tear to the car itself is avoided when the car is moving via the Seatrain Lines. This results not only in prolonging the life of the car, thereby making it possible for the car so handled to earn greater mileage, but also avoids repair bills necessary when the car is handled over the all-rail service.

5. Per diem—While it is assumed that the operating committee will deal with this subject quite fully, it should be pointed out that even if Seatrain Lines paid the customary per diem charge (which they are not doing) the arrangement would not be fair to the railroad carriers, as the per diem rules and charges are based on the reciprocal and interchangeable use by the rail carriers of the various classes of equipment they own and maintain.

6. In conclusion, it is considered of utmost importance that this class of service be not recognized in the same category as the break-bulk routes generally accorded differential rates. Should this eventuate and it be not only free from the inherent disadvantages of break-bulk service but substantially equal of rail service, it will be readily appreciated that such Seatrain service would be extended not only along the entire Atlantic and Gulf coast and tributary rivers but would spread to the Great Lakes as well, and with free and unrestricted interchange with the rail carriers the inroads thus made upon all-rail business would be tremendous:

1. At present the break-bulk lines, such as Eastern Steamship Company from New York, the Philadelphia & Norfolk Steamship Company from Philadelphia and the Bay Lines from Baltimore have differential water and rail rates from the North Atlantic port cities to points in Central Freight Association and Western territories via water to Norfolk and rail beyond.

Were the Seatrain Lines to inaugurate services from the North Atlantic ports, that is, Boston, Providence, New

Exhibit E

York, Philadelphia, Baltimore via Norfolk, and the rail lines recognized that Seatrain Lines is entitled to rates on differential equal to the break-bulk lines (lower than the all-rail route rates), a large proportion of the traffic now moving from these port cities all-rail to the West which is not susceptible to transfer enroute, as is necessary via the break-bulk routes, would move via Seatrain Lines, thereby depriving all-rail carriers of a very valuable traffic.

2. Similarly, were Seatrain operation inaugurated on the Great Lakes and operated on a basis of break-bulk differential rates, the effect on the all-rail lines would be most serious, not only as to business between the Lake ports themselves, such as Buffalo, Cleveland, Toledo, Detroit, Chicago, Milwaukee, Duluth, etc., but also, and more important still, on all business between Eastern territory on the one hand and Central and Western territories on the other, e.g., such traffic from New York to Cleveland, Detroit, Chicago or Milwaukee, on which all-rail movement is essential at present, would be subject to competition via Buffalo and the Lakes from such (Seatrain) service, which, while equivalent of all-rail movement, would offer (lower) differential rates.

In both these examples, all traffic, even tank car and refrigerator car business, would be open to the competition of a service equivalent to that of the all-rail routes as against the somewhat limited class of traffic available to the break-bulk routes, and this equivalent service would be on the basis of rates lower than applying all-rail. Such competition, offering the two-fold advantages of all-rail movement and lower than all-rail rates, would have a most serious effect on the revenues of the all-rail carriers.

For these reasons we feel that the necessity for declination of the requests under consideration have been clearly established.

(signed) W. S. Franklin
Vice-President—Traffic

Exhibit F

MINORITY REPORT OF OPERATING COMMITTEE SUBMITTED BY PENNSYLVANIA RAILROAD

May 10, 1935.

Mr. D. T. Lawrence, Chairman
Trunk Line Association
New York, N.Y.

Dear Sir:

Not being in agreement with the other two members of the Operating Committee considering Seatrain matters, I am submitting herewith a dissenting report on the subject:

The railroads should oppose setting up working arrangements with Seatrain for the following reasons:

1. The service is essentially that of an all rail carrier and not entitled to break-bulk rates.

2. The service is superior to that of the break-bulk routes and therefore rates should be higher.

3. Break-bulk routes will undoubtedly apply and secure a differential under Seatrain rates to which the railroads will probably contribute and further shrink their revenues.

4. Per diem is a reciprocal charge as between railroads based on the average cost of ownership, and if the railroads should eventually agree to take the plan of permitting the Seatrain to misuse their equipment by handling it contrary to the provisions of the Car Service Rules, consideration should be given obviously to an adequate charge for the use of railroad property predicated upon the value of the particular class of equipment used and not on the average ownership basis set up for reciprocal purposes.

Exhibit F

5. Danger of spread to North Atlantic ports and to the Great Lakes if Seatrain were recognized in same category as break-bulk routes and accorded differential water and rail rates.

In view of the adverse effect Seatrain Lines has on the eastern and southeastern carriers, it is my opinion that the railroads should take uniform action and not deliver any cars to the Seatrain Lines, Inc., such action being defended under the provisions of Car Service Rule No. 4, reading as follows:

"Cars of railroad ownership must not be delivered to a steamship ferry or barge line for water transportation without permission of the owners filed with the Car Service Division."

A small group of railroads cannot legislate on per diem matters for all the railroads in the United States whose equipment might be subject to use by the Seatrain. Consequently, the New York Central Lines, the Erie and Pennsylvania Railroad cannot legislate on matters of this character. This must be placed in the hands of the A.A.R. in pursuance of the Car Service and Per Diem agreements. Therefore the matter of car hire should be referred to that body for their recommendations and their recommendations should be secured before any action is taken upon the question as to whether we shall or shall not establish through routes and rates via the Seatrain.

Yours very truly,

J. F. Deasy, V.P. (signed)

Exhibit G

EXCERPTED FROM MINUTES, MEETING BOARD OF DIRECTORS, ASSOCIATION OF AMERICAN RAILROADS, MAY 25TH, 1939.

February 15, 1939.

Rules and Regulations Governing the Interchange of Equipment with Seatrain Lines.

Mr. Pelley:

This subject, under Docket No. 5, was fully discussed by the Board at its Jan. 27th meeting and, as a result thereof, the following resolution was adopted:

> "RESOLVED, That the Officers of the Association be instructed to oppose the Seatrain in every way, including the case now pending before the I. C. C., and determine upon the proper method by the railroads to meet this competition."

The subject is docketed for reconsideration based upon letters from the Chief Executives of two Member Roads, in which it is alleged that the resolution deals with a question wholly without the purview of matters committed to the Association and, as a result thereof, formal request is made that a called meeting of the Board of this Association be held forthwith and that said resolution be rescinded; also, that if the Association believes it has jurisdiction to consider this a controversial question, that said Railroads be given notice and an opportunity to be heard before any action is taken by the Association.

In 1932, matters pertaining to the interchange of equipment with Seatrains, Inc. were considered by the Car Service Division of the American Railway Association. By action of the Transportation Division, Circular 2953 was issued under date of Nov. 15, 1932 with regard to proposed new Car Service Rule 4 and with reference to certain changes in the Per Diem Rule. Car service and interchange arrangements in connection with the Seatrain were further considered and handled by the General Committee, Transportation Division of the American Railway Association both as regards questions of per diem and the interchange of cars. There can be no question but what these were subjects under the American Railway Association that were within the purview of that Association. When the American Railway Association was consolidated with the Association of American Railroads, it is our understanding that all jurisdiction previously had by the American Railway Association was incorporated in the Association of American Railroads and that clearly the Association of American Railroads has jurisdiction over interchange rules and per diem arrangements.

The instant matter pending before the Interstate Commerce Commission is not a controversy as between Member Roads. It is rather a controversy as between Member Roads on the one hand and Seatrain, Inc. on the other, and involves a question as to what the proper charge should be for the use of railroad equipment by Seatrain, Inc. We believe there exist many reasons that will fully justify charges for the use of railroad equipment in excess of ownership cost. This principle, we believe, ought to be established by the Interstate Commerce Commission in order to prevent to the fullest extent possible the further development of vessel-ferry movement of freight cars which presently is threatened on the Pacific and Atlantic coasts and from the Atlantic to Texas ports. Every time an operation of this kind becomes effective, it adds to the rail competition and deprives the rail carriers of substantial revenues. Obviously, the higher the charge that can be justified for the use of railroad equipment, the less liability there will be of further extension of operations of this character.

J. W. King

A. F. Cleveland.

Exhibit H

Seatrain Lines, Inc. v. The Akron, Canton & Youngstown Ry. Co. et al.

Docket No. 25727

Agwilines, Inc. et al. v. Seatrain Lines, Inc. et al.

Docket No. 27445

Class Rates Via Seatrain Lines, Inc.

I. and S. Docket No. 4542

CHRONOLOGY

	On or About
Seatrain's complaint in Docket 25727 filed with Interstate Commerce Commission	Dec. 28, 1932
Request by Southern Pacific et al. that all hearings be deferred until after Commission's decision in investigation of Seatrain Lines, Inc. Docket 25565	Feb. 21, 1933
Case assigned for hearing on Nov. 6, 1933 by notice of	Sept. 4, 1933
Eastern Trunk Lines, Southern Railroads and Southern Pacific requested postponement of hearing	Oct. 20, 1933
Hearing postponed to Dec. 18, 1933	
Hearing at Washington. Witnesses for Seatrain appeared ready for hearing. Defendant railroads made a joint motion that hearing be postponed pending decision on Panama Canal Act applications, Docket 25546	Dec. 18, 1933
Trial Examiner referred the motion to Chief Examiner, who adjourned hearing to	Jan. 22, 1934

Exhibit H

	On or About
Missouri Pacific and Texas & Pacific requested the Commission to defer further hearings on their applications, Docket 25546, to see whether Congress would amend or repeal Panama Canal Act.	
Counsel for Seatrain renewed request that hearings on complaint should not be held up, especially in light of request of Missouri Pacific and Texas & Pacific for postponement of further proceedings in Docket 25546	Jan. 5, 1934
Nevertheless the Commission indefinitely postponed hearing in Docket 25727	Jan. 8, 1934
Commission telegraphed Docket 25727 would be held in abeyance pending determination of Docket 25546	Feb. 6, 1934
Motion by Seatrain that Commission reconsider its decision and order holding Docket 25727 in abeyance	Mar. 7, 1934
Seatrain's motion denied by Commission	May 7, 1934
Petition filed by Seatrain requesting the Commission to submit interrogatories to the railroads for the production of data in their possession relevant to the issues	
Seatrain's petition denied by Commission	May 7, 1934
Commission's decision on Panama Canal Act applications, Docket 25546, and second decision in Seatrain Investigation, Docket 25565	Feb. 5, 1935
On receipt of this decision, certain Eastern Railroads expressed hope differences involved in pending complaints could be settled and re-	

Exhibit II

	On or About
quested hearings be deferred pending efforts to settle by negotiation. Seatrain therefore wrote Commission at request of these railroads asking that Docket 25727 be not set for hearing until Commission further advised	June 26, 1935
Negotiations proved futile owing largely to opposition of Pennsylvania Railroad and unwillingness of other railroads to take independent action. Therefore Commission requested by Seatrain to set Docket 25727 for hearing.	April 30, 1936
Case assigned for hearing on July 15, 1936 by notice received.	May 6, 1936
Counsel for Trunk Line Association and Southearn Railroads requested cancellation of hearing set for July 15, 1936 to give them opportunity to raise question of effect of Seatrain's operations via Havana upon Commission's jurisdiction to prescribe through routes and joint rates. Seatrain opposed postponement on ground that this question could not be determined without evidence and therefore until after hearing. Commission, however, postponed hearing to October 7, 1936 by notice received	June 19, 1936
Oral argument on question of jurisdiction	July 18, 1936
Order of Commission denying motion of railroads to dismiss for lack of jurisdiction on ground that question could not be passed upon until after hearing and receipt of evidence.	Aug. 5, 1936
Hearing before Examiner	Oct. 7 to 10 and 13 to 17, 1936

Exhibit H

	On or About
Proposed report received	June 7, 1937
Oral argument	July 19, 1937
Commission's decision in Docket 25727 and 27445 (226 I. C. C. 7)	Jan. 28, 1938
Commission's order requiring compliance therewith by April 15, 1938	
Petitions filed by Eastern Trunk Lines, Southwestern, and Southern Railroads for postponement of effective date of order on ground that railroads did not have time to comply therewith	Feb. 25, 1938 Mar. 2, 1938 Mar. 5, 1938
Reply by Seatrain opposing petitions for postponement	
Commission postponed effective date of its order in so far as it required establishment of joint rates to June 15, 1938	Mar. 9, 1938
Various defendants again petitioned for postponement of effective date of order on ground they did not have time to comply therewith and Seatrain replied in opposition	May 7 to 11, 1938
About the same time Southern Railroads petitioned Commission for indefinite postponement of order and for reopening for further hearing on question of discrimination arising from railroads' failure to absorb terminal charges at New Orleans on Seatrain traffic to the same extent such charges absorbed on traffic interchanged with the break-bulk lines and moving under local or proportional rates to and from New Orleans. Seatrain opposed petition	

Exhibit H

	On or About
Conference at Washington with members of Commission and representatives of defendant railroads regarding dilatory tactics of railroads in complying with order. Commission again postponed order for 45 days from June 15, 1938 on understanding railroads would take immediate steps to comply therewith	May 12, 1938
Commission indefinitely postponed its order and reopened case for further hearing on question of absorptions at New Orleans on application of Southern railroads, assigning case for further hearing September 14, 1938	June 17, 1938
Still another petition for indefinite postponement of the order filed by Eastern railroads and others	June 22, 1938 June 27, 1938
Commission again postponed effective date of its order with respect to joint rates to November 1, 1938	July 25, 1938
Eastern railroads filed petition for Fourth Section relief and waiver of tariff rules permitting publication of rates on maximum basis permitted by Commission's decision without Seatrain's concurrence	July 12, 1938
Complainant replied thereto	July 18, 1938
Commission denied petition	July 22, 1938
Meanwhile Eastern railroads, purporting to use concurrence given to Agent Peel of Southwestern railroads which had been cancelled and in direct contradiction of express instructions of Seatrain and interested Southwestern Lines, filed tariff publishing rates on maxi-	

Exhibit H

	On or About
minimum basis permitted by Commission's order. On protest of Seatrain and interested Southwestern lines tariff suspended an investigation instituted by Commission's order of	July 18, 1938
There followed various petitions and replies regarding departures from the Commission's tariff rules sought by the railroads to enable them to publish rates contrary to the Fourth Section and the instructions of Seatrain and its Southwestern connections.	
Further hearing before Examiner on the phase of the case reopened at the request of the Southern railroads, as to which they had sought further hearing on the ground they had not understood question of absorptions at New Orleans was involved and desired opportunity to present evidence. Despite fact this hearing was at their request, they offered no new evidence and their witness admitted he had not even read the record of previous hearing. Seatrain requested that original order be restored. Motion denied by Examiner	Sept. 14-15, 1938
Hearing in suspension proceeding involving tariffs filed by Eastern railroads	Nov. 30, 1938 Dec. 1 and 2, 1938
At the conclusion of Seatrain's evidence, railroads requested an adjournment and over Seatrain's objection hearing adjourned by Examiner to February 3, 1939	
Complainants in Docket 27445, the break-bulk lines, petitioned the Commission to reopen proceedings on their complaint. This was fol-	

Exhibit H

	On or About
lowed by a petition by Seatrain to reopen Docket 25727 for further hearing solely on the question whether joint through rates via Seatrain should be higher than joint through rates via the break-bulk lines	Dec. 12, 1938
Hearing on reopened cases	Feb. 8-11, 1939
Defendants requested adjournment and over objection adjournment granted to	Feb. 17, 1939
Briefs filed	Apr. 15, 1939
Brief filed by Seatrain Lines with motion for receipt of additional evidence asking that revised figures of costs submitted by Witness Anderson be accepted as supplementary exhibit	May 9, 1939
Reply by defendant steamship lines to above motion and also their motion for receipt of additional evidence	May 22, 1939
Reply of Eastern lines to Seatrain motion	June 5, 1939
Reply by Seatrain Lines to motion of defendant steamship lines.	June 6, 1939
Commission's Order of July 10, 1939 grants our motion of May 9, 1939 and overrules the defendant steamship companies motion of May 22, 1939.	
Examiners proposed report received	May 8, 1940
Motion filed by Seatrain Lines asking Commission to reject and strike those portions of proposed report referring to proposed measure of through rates and also objecting to the cost computations made by Commission's Cost Section	May 24, 1940

Exhibit H

	On or About
Reply of defendant steamship lines to above motion	June 6, 1940
Exceptions to Examiners report by Seatrain and others	May 22 to June 10, 1940
Replies to Seatrain exceptions by others	June 15-19, 1940
Reply of Seatrain and supporting parties to exceptions of others	June 18-20, 1940
Oral argument held	June 21, 1940
Decision and order of Interstate Commerce Commission received (dated December 23, 1940) to take effect May 1, 1941	Jan. 11, 1941
Rates published effective	May 1, 1941
Commission issued orders on December 26, 1941 deleting from its original order requirement for issuing through export bills of lading in connection with Seatrain Lines. This was agreed to by us because the railroads had discontinued this practice in connection with our competitors.	
Petition of Seatrain Lines for modification of order to conform to findings or for interpretation and clarification of order.	Jan. 5, 1944
Reply of Pennsylvania Railroad and others associated with them in the car service case to above petition.	Jan. 31, 1944
Commission's denial of our petition	Feb. 15, 1944
Petition of Seatrain Lines renewing its petition of January 5, 1944	July 24, 1944

Exhibit H

	On or About
Reply of Pennsylvania Railroad and its associates to above petition	Aug. 26, 1944
Commission's order denying our petition of July 24, 1944	Oct. 2, 1944
Petition of Seatrain Lines for reconsideration of Commission's order dated October 2, 1944 and for expedited relief.	Oct. 14, 1944
Reply of Pennsylvania Railroad and its associates to above petition	Oct. 21, 1944
Proceeding reopened for further hearing	Oct. 2, 1944
Petition of Seatrain for expedited procedure	Oct. 14, 1944
Order of I. C. C. sets aside its order of Oct. 14, 1944 and reopens case for reconsideration	Nov. 13, 1944
Order of I. C. C. amending its order of Jan. 28, 1938 requiring rates and routes via New York and New Orleans instead of via Hoboken and Belle Chasse.	Dec. 5, 1944
Pennsylvania and other railroads file suit to set aside Order of I. C. C. dated Dec. 5, 1944.	Dec. 29, 1944
Seatrain files petition with I. C. C. requesting modification of I. C. C. order of Dec. 5, 1944 to eliminate the Pennsylvania and other roads which had brought suit to set aside the order	June 2, 1945
Pennsylvania and other roads file consent to Seatrain's petition	June 7, 1945
I. C. C. modifies its order of December 5, 1944 eliminating Pennsylvania and other roads therefrom but leaving its original order of Jan. 28, 1938 applicable to such roads	June 20, 1945

Exhibit I

HOBOKEN MANUFACTURERS RAILROAD COMPANY

v.

ABILENE & SOUTHERN RAILWAY COMPANY et al.
Docket No. 25728

NEW ORLEANS AND LOWER COAST RAILROAD COMPANY

v.

THE AKRON, CANTON & YOUNGSTOWN RAILWAY COMPANY, et al.
Docket No. 25878

CHRONOLOGY

	On or About
Complaints filed with Interstate Commerce Commission	Jan. 1933
Hearings	Nov. 2-4, 1933
(At hearing no contention made by defendant railroads that if they should be required to permit interchange of their cars with Seatrain compensation should be more than the going per diem rate of $1.00 per day. Whole defense was lack of judisdiction predicated on fact Seatrain was a water carrier.)	
Briefs filed	Dec. 16, 1933
Proposed report of Examiner	Mar. 31, 1934
Oral argument	June 8, 1934

Exhibit I

	On or About
Decision of Commission that it has jurisdiction to require defendants to interchange cars in performance of through transportation over through routes to which they are parties but that question of existence of through routes was awaiting determination in Docket 25727	Feb. 5, 1935
Decision in Docket 25727 affirming jurisdiction to require interchange of cars, finding that through routes existed or should be established for through transportation via Seatrain, that interchange of cars was efficient and economical method of performing through transportation and if railroads did not consent to interchange matter should be brought again to Commission's attention.	Jan. 28, 1938
Many of the railroads not having consented, complainants filed motion for entry of order requiring railroads still refusing to permit interchange of their cars with Seatrain in conformity with decision	July 12, 1938
Reply on behalf of Eastern railroads, later joined in by Southern railroads, for first time making contention that compensation to be paid by Seatrain might be greater than $1.00 per day and requesting hearing on question of compensation before entry of order	Aug. 14, 1938
Commission reopened the proceeding for further hearing "to determine upon what terms and conditions (including compensation) defendants should be required to interchange their cars with intervener Seatrain Lines, Inc."	Nov. 21, 1938

Exhibit I

	On or About
Case assigned for further hearing on January 25, 1939	Dec. 13, 1938
Counsel for certain Eastern railroads requested conference to consider settlement of case, consent to interchange of cars and agreement as to reclaim and per diem matters under discussion. Conference held and tentative basis of settlement arrived at. Agreed to by counsel for some roads and as to Pennsylvania taken under advisement	Jan. 10, 1939
Pennsylvania refused to approve settlement and other railroads would not go through with it. Therefore case came on for hearing before Examiner	Jan. 25, 1939
At this time, although hearing was at request of railroads on question of compensation, counsel for railroads stated railroads did not know position they would take and requested adjournment to submit matter to A. A. R. for instructions. Counsel for complainants objected to adjournment on ground that if railroads did not then know their position they had not filed petition for further hearing in good faith and requested Examiner to close the hearing and submit case for order. Examiner declined and adjourned hearing to February 15, 1939 on proposal of railroads to submit question to A. A. R., general understanding being that A. A. R. would be asked to approve tentative settlement	
Meeting of Directors of A. A. R., at which instead of considering tentative basis of settlement	

Exhibit I

	On or About
they received and adopted a resolution reading: "That the officers of the Association be instructed to oppose the Seatrain in every way, including the case now pending before the Interstate Commerce Commission."	Jan. 27, 1939
Railroads requested postponement of hearing set for February 15, 1939 and hearing adjourned to	Feb. 28, 1939
Hearing at New York	Feb. 28 to March 2, 1939
At this hearing, over complainants' objection, A. A. R. allowed to intervene and counsel for A. A. R. did all examining of witnesses in opposition to complaint. A. A. R. by its evidence for first time injected into proceeding over complainants' objection question of reclaim and detention of cars at ports	
Briefs filed	May 25, 1939
Proposed report of Examiner recommending the Commission find per diem rate of $1.00 per day reasonable compensation	Aug. 22, 1939
Exceptions of certain defendants and of the intervenor, Association of American Railroads, to the examiner's proposed report.	Sept. 19, 1939
Reply of certain defendants and intervenor, Association of American Railroads, to exceptions of Hoboken Manufacturers Railroad Company and intervenor, Seatrain Lines, Inc.	Sept. 28, 1939
Oral argument	Nov. 2, 1939

Exhibit I

	On or About
At oral argument counsel for complainants argued that reclaim and detention questions, since they had not been raised by complaints and answers and were questions simply between switching lines at the ports and their direct connections and did not involve car owners as such, were not properly in issue but asked that if Commission held to contrary it should reopen case for further hearing on these questions	
Decision of Commission failing to make any finding on question of compensation but holding that reclaim questions were in issue and reopening case for further hearing	Jan. 8, 1940
In view of the fact that a substantial number of railroads had recorded their consents to the delivery of their cars to Seatrain without condition, motion filed by complainant in Docket 25728 for dismissal of case as to these defendants on ground that complaint has been satisfied by them	Feb. 27, 1940
Motion denied by Commission	Apr. 1, 1940
Motion by N. O. & L. C. for dismissal and discontinuance as to certain defendants	Apr. 5, 1940
Further hearing held	Sept. 16, 1940
Briefs filed by all parties	Nov. 15, Dec. 2, 1940
Examiners report received	Jan. 23, 1941
Exceptions filed by complainants with motion for inclusion of additional facts in record and for limitation of issues	May 5, 1941

Exhibit I

	On or About
Exceptions of defendants to proposed report	May 6, 1941
Complainants reply to defendants exceptions	May 15, 1941
Defendants reply to complainants exceptions and motion	May 16, 1941
Oral Argument held	June 12, 1941
Commission's decision and order dated October 13, 1941 to take effect February 2, 1942 received	Nov. 17, 1941
Petition of defendants for reconsideration and modification of order	Dec. 10, 1941
Petition of Pennsylvania R. R. for clarification of finding 1 of the decision of Oct. 13, 1941	Dec. 13, 1941
Petition of defendants for modification of findings and order of Commission's decision of Oct. 13, 1941	Dec. 13, 1941
Reply of N. O. & L. C. to defendants petition of December 10, 1941	Jan. 13, 1942
Reply of Seatrain and H. M. R. R. to defendants petitions of Dec. 10 and 13, 1941	Jan. 15, 1942
Petition of New Orleans Belt RR for leave to intervene and for reconsideration and modification of order	Jan. 5, 1942
Reply of Seatrain Lines to above petition	Jan. 16, 1942
Commission's Order dated Mar. 2, 1942 denying defendants petitions of Dec. 10 and 13, 1941 and petition of N. O. P. B. Ry., received	March 14, 1942
Commission has postponed effective date of its Order of Oct. 13, 1941 from time to time pending decision of Courts.	

Exhibit I

	On or About
Petition of Pennsylvania Railroad and other railroads filed with District Court of the United States, District of New Jersey filed March 26, 1942, to enjoin Commission's Orders in car service case;	
Amended petition of Pennsylvania Railroad and other petitioners filed	Apr. 15, 1942
Answer of Hoboken Manufacturers Railroad, filed	May 12, 1942
Answer of Interstate Commerce Commission filed	May, 1942
Application of Hoboken Manufacturers Railroad and Seatrain Lines, Inc. for permission to intervene in court proceedings filed	May 13, 1942
Order of court allowing intervention dated May 18, 1942, signed by Judge Fake	
Answer of United States to petition of Pennsylvania and other railroads filed	May 15, 1942
Motion of New Orleans and Lower Coast Railway Company for leave to intervene, filed	May 14, 1942
Order of Judge Fake dated May 14, signed, permitting intervention of New Orleans and Lower Coast	
Answer of New Orleans and Lower Coast filed	May, 1942
Brief of Hoboken Manufacturers Railroad and Seatrain Lines, Inc. filed with District Court in car service cases dated May 23, 1942	
Brief of petitioners filed May 23, 1942	
Reply brief of Hoboken Manufacturers Railroad and Seatrain Lines, Inc. dated July 21, 1942	

Exhibit I

Reply brief of Pennsylvania Railroad and other petitioners, filed July 1942	
Brief of New Orleans and Lower Coast, filed	July, 1942
Briefs of United States and Interstate Commerce Commission, filed	July, 1942
Argument before Statutory Court.	
Opinion of statutory court rendered	July 9, 1943
Argument before statutory court in respect to form of final decree	Nov. 20, 1943
Filed decree with District Court	November, 1943
Filed petition for appeal and various appeal papers appealing from decision of statutory court in car service cases	January, 1944
I. C. C. order postponing effective date of its order to 3/15/45	Oct. 14, 1944
Briefs now being prepared for filing with Supreme Court	Dec. 15, 1944
Case argued	Jan. 8, 1945
Decision of Supreme Court	Jan. 29, 1945
Petition of certain railroads for postponement and reconsideration of effective date of Commission's order	March 2, 1945
I. C. C. order dismissing petition for postponement	March 15, 1945
Seatrain's reply to petition for reconsideration	March 27, 1945
I. C. C. order denying railroad petition for reconsideration	May 14, 1945

Exhibit J

ASSOCIATION OF AMERICAN RAILROADS
Operations and Maintenance Dept.
Operating-Transportation Division
59 East Van Buren Street
Chicago 5

November 21, 1950

J. H. Aydelott, Vice-President
Operations and Maintenance Department

Officers of Division
P. J. Lynch, Chairman
F. A. Dawson, Vice-Chairman
L. R. Knott, Executive Vice-Chairman

Docket T 280

General Committee

Dear Sir:

The following memorandum November 14, 1950, from Mr. J. Carter Fort, VP and GC, AAR Law Department, and the attached memorandum dated October 30, addressed to him by Mr. G. S. Prince, Assistant General Solicitor, pertaining to the status of Seatrain Lines, Inc., with respect to the Car Service and Per Diem Agreement and Interchange Agreement are added to the docket for consideration at the next meeting of the Committee:

> "This is in further response to your memorandum of September 22nd, supplemented by your memorandum of the 27th, in which you call attention to a question which has been pending on the docket of the General Committee for sometime, relative to Seatrain Lines, Inc. becoming a subscriber to the Car Service and Per Diem Agreement and the Inter-

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change Agreement. With your letter was enclosed a copy of a memorandum of February 7, 1950, addressed to Mr. Mahoney by Mr. R. S. Outlaw.

I am enclosing a copy of a memorandum of October 30, addressed to me by Mr. Prince of this office, in which he discusses the subject at some length. You will observe that the question is a complex one. If Seatrain Lines, Inc. is refusing to conform with what the railroads regard as reasonable practices in connection with interchange and per diem arrangements, there is little doubt, I think, that we could obtain relief from the Commission in an appropriate proceeding, perhaps upon application to reopen the old case in which an order was entered requiring railroads to interchange their cars with Seatrain. In such a proceeding we could request the Commission to condition its requirement concerning the interchange of cars upon the signing of an agreement by Seatrain that it would conform to such practices as the Commission might find reasonable. How closely the practice which the Commission would prescribe would follow those that are to be found in the car service and per diem rules I do not know. We find some difficulty in making a reply to your inquiry which might be helpful as a practical matter because we are not advised of the features of Seatrain's present practices which are unsatisfactory and require remedy.

If the General Committee feels it should pursue this matter further, we will be glad to confer with Mr. Outlaw and give additional consideration to the possible resort to the Interstate Commerce Commission."

Yours very truly,

(Signed) L. R. Knott
Executive Vice-Chairman

Exhibit J

October 30, 1950

Mr. Fort:

This is in answer to your pencilled notation of September 25, on a memorandum to you of September 22 from Mr. L. R. Knott, asking for the views of the Law Department with respect to the possibility of making an arrangement to apply generally to the interchange of equipment with Seatrain Lines, Inc. Mr. Knott asked in particular for our comment and opinion with respect to a memorandum on the subject from Mr. Outlaw which was attached to Mr. Knott's memorandum to you. Mr. Outlaw stated that in his opinion "legal procedure is available to compel Seatrain to sign the car service and per diem and interchange agreements."

I do not believe it is necessary to review the entire background of the controversy between Seatrain and the railroads and all of the various problems which have arisen between these parties from time to time, but I think it might be well to set forth a broad outline of certain major points.

The original controversy between the railroads and Seatrain grew out of Rule 4 of the Car Service Rules, which reads as follows:

> Cars of railroad ownership must not be delivered to a steamship, ferry or barge line for water transportation, without permission of the owners, filed with the Car Service Division.

A substantial number of railroads, acting in conformity with this rule, refused to give permission for their cars to be delivered to Seatrain. As a result of this action, Seatrain filed complaints with the Interstate Commerce Commission in which the issue presented was whether defendants should be required to turn over their cars to complainants for Seatrain's use and, if so, upon what terms and conditions, including compensation.

The Commission found that the defendants, "according as they participate in through routes with complainants and Seatrain," by refusing to agree to the interchange of freight cars owned by them with complainants for delivery to Seatrain, "have failed to provide reasonable facilities for operating such routes and to make reasonable rules and regulations with respect to their operations, in violation of Section 1(4) of the Interstate Commerce Act." The Commission also found that the then current per diem rate of $1.00 per day would be reasonable for application to the interchange of cars between defendants and complainants for use by Seatrain. The Commission then made this further finding (*Hoboken Manufacturer's Railroad Company* v. *Abilene and Southern Railway,* 248 I. C. C. 109, 119-120):

> Defendants urge that Seatrain should be required to make report of its detention of cars directly to the owning lines and to make settlement of per diem charges directly with them instead of through complainants. Seatrain is willing to do this, but points out that apparently this method of settlement would require it to become a party to the car-service agreement in which the subscribing railroads have agreed to abide by the per diem rules. Since there is no difference of opinion as to the desirability of making direct settlement, no finding on this point appears to be necessary, and the method of accomplishing the result will be left to the intervener, Association of American Railroads.

The Commission's order was sustained by the Supreme Court of the United States, in *U. S.* v. *Pennsylvania R. Co.,* 323 U. S. 612. The Supreme Court, in its decision, set forth the pertinent provisions of the Interstate Commerce Act as follows (p. 619):

> Sec. 1(4) of Part I of the Act imposes a duty on railroads to establish reasonable through routes with other carriers, including water carriers, and to "provide reasonable facilities for operating such routes" under "reasonable rules and regulations."
>
> Sec. 3(4) makes it the duty of railroads to "afford all reasonable, proper, and equal facilities for the interchange of traffic between their . . . lines and connecting lines, and for the . . . forwarding . . . of . . . property to and from connecting lines," and a "connecting line" is defined to include a water carrier.
>
> Sec. 15(3) supplements these sections by providing that the Commission may hold hearings, and "shall," if it deems it "necessary or desirable in the public interest, . . . establish through routes . . . and the terms and conditions under which such through routes shall be operated."

The Court then went on to say (p. 619):

> These sections provide sufficient authorization for the Commission's order. It was from its power to require through routes that the Commission originally derived its power to require interchange of railroad cars among connecting railroads. Since a rail-water through route with Seatrain cannot function without an interchange of cars, the unquestioned power of the Commission to require establishment of such routes would be wholly fruitless, without the correlative power to abrogate the Association's rule which prohibits the interchange.

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It seems reasonably clear that under the decisions of the Interstate Commerce Commission and the Supreme Court railroads which do have through routes with Seatrain or other water carriers are obliged to permit the interchange of their equipment with such water lines under reasonable rules and regulations. It is also clear that the Commission has ample authority to pass upon the reasonableness of rules and regulations governing interchange established by the railroads, or to prescribe reasonable rules and regulations for this purpose.

I do not believe the Commission's ruling in the Seatrain case means that Seatrain could be required to sign the car service and per diem and interchange agreements as such and in their present form. Mr. Outlaw probably did not intend that his language to this effect be construed literally. The essential inquiry is whether these particular rules and regulations are reasonable ones for the government of the interchange of equipment between the parties. In this connection, attention is called to the fact that the Commission has already found that Car Service Rule 4 as it was originally interpreted, namely, to give any railroad the option to refuse to interchange its cars with Seatrain, was an unreasonable rule. Rule 4 is still in the Car Service Rules in the same form, but attention has been called, through special circulars, to the changed interpretation which must be given to it by reason of the Commission and Supreme Court decisions. The Per Diem Rules also contain a rule which is probably inappropriate. Although not included in its specific findings, the Commission in effect held that Per Diem Rule 15, having to do with per diem reclaims, could not be interpreted to apply in the same manner to Seatrain as it did to railroads generally. Its decision on this point was that the burden of car detention at the ports should be on the line-haul rail carriers when traffic is interchanged with Seatrain, just as when it is intercheanged with the break-bulk water carriers, and therefore that Seatrain could not be forced to assume the payment of reclaim to the line-haul carriers on cars being held at the ports for delivery to Seatrain. In other words, the Commission has already held that certain of the Car Service and Per Diem Rules would be unreasonable if applied to Seatrain.

Another rule which was considered by the Commission was the one which requires direct settlement with the car owner for per diem (Per Diem Rule 4). As indicated in the quotation above, from the Commission's findings, apparently the carriers desired such a method of settlement at that time and Seatrain had expressed a willingness to do this. As a matter of actual fact, however, settlement of per diem has never been made in this way. At that time settlement was made by Seatrain with its direct connections, and this method of settlement has been employed continuously since that time. The file would seem to indicate that most of the line-haul carriers concerned do not object to this method of settlement, but it is not known whether at this time they would prefer direct settlement with the owners if it could be had. Also, it is not known what the attitude of Seatrain would be with respect to this matter at this time.

While not so stating directly, Mr. Outlaw's memorandum seems to imply that the Commission has already determined that Seatrain must settle directly with car owners for per diem if the carriers insist upon it. I do not believe the decision of the Commission should be so construed. The fact that Seatrain expressed a willingness to settle in this manner at that time would not, in my judgment, preclude it from objecting to this method of settlement today. In the absence of agreement, I believe the Interstate Commerce Commission would feel free to make its determination on this issue on the basis of all the relevant circumstances as they exist today. It seems clear that the

Commission would not necessarily require settlement to be made directly with the owning road simply because that was the method required under the Car Service and Per Diem Rules in the case of railroads generally. For instance, the Commission has already held that shortline railroads which are less than 100 miles in length and which connect with only one railroad shall not be required to report per diem accruals to car owners but shall be attached to their connecting carriers for the purpose of car-hire settlement. This was one of the findings in *Rules for Car-Hire Settlement*, 160 I. C. C. 369, 165 I. C. C. 495. The Commission's decision on this point was upheld by the Supreme Court in *Chicago R. I. & P. Ry. Co.* v. *United States*, 284 U. S. 80.

I have not examined all of the Car Service and Per Diem Rules, but I am certain there are others among them that are inappropriate or questionable for application to the interchange of cars between the railroads and water-lines performing a service similar to that rendered by Seatrain.

As previously stated, I doubt that Seatrain could be made to sign the present Car Service and Per Diem and Interchange agreements. This is not because of any inherent lack of power in the Commission but because the present such rules are not designed or appropriately drawn for application to an operation such as Seatrain's and would be held to be, in certain respects at least, unreasonable. On the other hand, while it is not certain, I think it probable that the authority of the Commission could be invoked, if it became necessary, to put into effect a reasonable set of rules and regulations governing the interchange of railroad cars with water carriers. The main cause for uncertainty on this score is that, as I gather from talking with representatives of the Car Service Division, the railroads generally are not experiencing any difficulty in connection with the interchange of cars with Seatrain and the settlement for per diem—that is, there doesn't seem to be any controversy between the railroads and Seatrain or any specific cause for complaint regarding the manner in which Seatrain handles cars while in its possession.

In order to invoke the Commission's jurisdiction, it seems to me that substantially the following course would have to be followed: First, the railroads would have to draft a set of rules and regulations that they deem to be reasonable governing the interchange of their freight cars with water carriers. These rules and regulations should be for application not only to Seatrain but to any other water-line engaged in a similar service. Next, the railroads should submit such rules and regulations to such water carriers in an effort to obtain an agreement which would make unnecessary any appeal to the Commission. Finally, if an agreement between the parties cannot be reached, I believe the Commission would take jurisdiction to pass on the reasonableness of such rules and regulations, upon a proper petition filed by the Association either reopening the former proceeding or instituting a new one. It seems to me the decision of whether a special set of rules and regulations to govern the interchange of freight cars with water carriers would be desirable is one of policy to be made by the General Committee. In the event of a decision to prescribe such a special set of rules and regulations, I think the General Committee should have the assistance of a special law committee.

G. S. Prince

United States Supreme Court Decision Re Car Service Case (323 U. S. 612)

SUPREME COURT OF THE UNITED STATES

[January 29, 1945.]

Nos. 47 and 48—October Term, 1944

◆

The United States of America, Interstate Commerce Commission, Seatrain Lines, Inc., *et al.*,
Appellants,

47 *vs.*

The Pennsylvania Railroad Company, *et al.*

The Pennsylvania Railroad Company, *et al.*,
Appellants,

48 *vs.*

The United States of America, Interstate Commerce Commission, Seatrain Lines, Inc., *et al.*

◆

Appeals from the District Court of the United States for the District of New Jersey.

Mr. Justice Black delivered the opinion of the Court.

Seatrain Lines, Inc., is a common carrier of goods by water. In 1929, its predecessor began to carry goods from Belle Chasse, Louisiana, to Havana, Cuba. Each of the vessels used was so constructed that it could carry a number of railroad cars, and special equipment was provided to hoist these cars from adjacent tracks on the docks and move them bodily into the vessels. It was thereby rendered unnecessary for goods carried to the ports in railroad cars to be unloaded from the cars and carried piece-meal into the vessels. This new method of transportation, so the Interstate Commerce Commission has found, was a great improvement over the old practice, less destructive to the goods, more economical and more efficient. 226 I. C. C. 7, 20-21. In 1932, Seatrain decided to initiate a new interstate service between Hoboken, N. J. and Belle Chasse, Louisiana, via Havana, Cuba, and thus entered into direct competition with the interstate transportation of freight by railroads. During the time Seatrain had limited its business to foreign transportation, i.e., Louisiana to Cuba, the non-competing railroads freely permitted it the use of their cars. Shortly after it began its interstate service, however, the following rule was promulgated by the American Railway Association:[1] "Cars of railway ownership must not be delivered to a steamship, ferry, or barge line for water transportation without permission of the owner filed with the Car Service Division." Thereafter, some railroads continued to permit Seatrain to use their cars but others, including the parties to this proceeding, refused to do so. No railroads "refused to permit delivery of their cars to any of the other eleven water lines listed in a circular of the Association as coming within the intendment of the rule." 206 I. C. C. 328, 337.

A complaint was filed with the Interstate Commerce Commission. Appropriate hearings were conducted and a series of findings and opinions were entered. The findings were that the sole object of the Association of Railroads' rule was to prevent diversion of traffic from the railroads to Seatrain; that Seatrain, as an interstate water carrier, was subject to the Commission's jurisdiction; that its interstate operations were in the public interest and of advantage to the convenience and commerce of the public; that the Commission had jurisdiction to require through rail-water interstate routes, and, where such through routes were established to require railroads to interchange cars with water carriers, 195 I. C. C. 215; 206 I. C. C. 328. An initial order of the Commission required the railroads to establish certain through joint rail-water routes with Seatrain. Such through interstate routes together with joint rates were established. 226 I. C. C. 7; 243 I. C. C. 199. The Commission then heard evidence and found that a payment of $1.00 per day would be a reasonable amount for Seatrain to pay the railroads for their cars while they were in Seatrain's possession. 237 I. C. C. 97; 248 I. C. C. 109. Based on its findings the Commission ordered the railroads to abstain from observing and enforcing rules and practices which prohibited the interchange of their freight cars for transportation by Seatrain in interstate commerce. The railroads promptly brought this action under 28 U. S. C. 41 (28), 47, to set aside the Commission's order. The District Court set aside the order insofar as it required railroads to interchange cars destined for carriage by Seatrain outside the territorial waters of the United States, but sustained it in all other respects. 55 F. Supp. 473. Both sides appealed directly to this Court as authorized by the Urgent Deficiencies Act of October 22, 1913, 28 U. S. C. 47, 47a, and Section 238 of the Judicial Code, 28 U. S. C. 345, par. (4).

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[1] Later the American Railway Association, and other railroad organizations consolidated their activities under the name of the Association of American Railroads. The new Association adopted the same rule.

First. It is contended that the railroads are under no duty to deliver their cars to Seatrain and that the Interstate Commerce Commission is without authority to require them to do so. It has long been held, and it is not denied here, that since the passage of the Interstate Commerce Act, railroads may be compelled to establish through routes[2] and to interchange their cars with each other,[3] both subject to reasonable terms. Nor is it denied that the railroads are under a legal duty, enforceable by proper Commission orders, to establish through routes with connecting water carriers.[4] The narrow contention is that the power granted the Commission to require establishment and operation of through rail-water routes does not empower it to require a railroad to interchange its cars with a water carrier. Since the Commission's order was entered after passage of the 1940 Transportation Act, 54 Stat. 898, the question must be decided under that Act. *Ziffrin, Inc.* v. *United States,* 318 U. S. 73, 78.

There is no language in the present Act, which specifically commands that railroads must interchange their cars with connecting water lines. We cannot agree with the contention that the absence of specific language indicates a purpose of Congress not to require such an interchange. True, Congress has specified with precise language some obligations which railroads must assume. But all legislation dealing with this problem since the first Act in 1887, 24 Stat. 379, has contained broad language to indicate the scope of the law. The very complexities of the subject have necessarily caused Congress to cast its regulatory provisions in general terms. Congress has, in general, left the contents of these terms to be spelled out in particular cases by administrative and judicial action, and in the light of the Congressional purpose to foster an efficient and fair national transportation system. Cf. *Chicago, R. I. & P. Ry.* v. *United States,* 274 U. S. 29, 36; *I. C. C.* v. *Railway Labor Executives Ass'n,* 315 U. S. 373, 376-377.

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[2] St. Louis S. W. Ry. Co. *v.* United States, 245 U. S. 136, 142-144.

[3] Missouri & Illinois Coal Company *v.* Ilinois Central Railroad Co., 22 I. C. C. 39, 44; Chicago, R. I. & P. Ry. Co. *v.* United States, 284 U. S. 80, 91, 101-102; cf. St. Louis, S. W. Ry. *v.* Arkansas, 217 U. S. 136, 145-146.

[4] Such has long been the ruling of the Interstate Commerce Commission. Chattanooga Packet Co. *v.* I. C. C. R. R. Co., 33 I. C. C. 384, 391-392; Flour City S. S. Co. *v.* Lehigh Valley R. Co., 24 I. C. C. 179; Decatur Navigation Co. *v.* L. & N. R. R. Co., 31 I. C. C. 281, 288; Pac. Navigation Co. *v.* Southern Pac. Co., 31 I. C. C. 472, 479.

The 1940 Transportation Act is divided into three parts, the first relating to railroads, the second to motor vehicles, and the third to water carriers. That Act, as had each previous amendment of the original 1887 Act, expanded the scope of regulation in this field, and correlatively broadened the Commission's powers. The interrelationship of the three parts of the Act was made manifest by its declaration of a "national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act, so administered as to recognize and preserve the inherent advantages of each." The declared objective was that of "developing, co-ordinating and preserving a national transportation system by water highway and rail, . . . adequate to meet the needs of the commerce of the United States . . ." Congress further admonished that "all of the provisions of this Act shall be administered and enforced with a view to carrying out the above declaration of policy." 54 Stat. 899.

This policy cannot be carried out as to Seatrain's interstate carriage unless railroads interchange their cars with it. The particular type of service introduced by Seatrain, and found by the Commission to be qualitatively superior, cannot be rendered without the privilege of carrying the very railroad cars which carry freight to its ports. The "inherent advantages of this service" would be lost to the public without railroad car interchange.

Furthermore, the Act calls for "fair and impartial regulation." The railroad Association's rule however is constructed on the premise that the railroads can at their discretion determine which water carrier may, and which may not, transport their cars. Seatrain alone, of all the water carriers, according to the Commission's findings, has been refused car interchange. This means that the Association's rule, if valid, enables the railroads to decline to deal with Seatrain as it does with other carriers. As early as 1914, the Commission had declared that the Interstate Commerce Act, as then in effect, prohibited railroad practices which lent themselves to such purpose. The Commission said at that time:

"If the rail carriers are permitted to choose the particular boat lines with which they will establish through routes and joint rates, they will be able to dictate who shall operate on the water and who shall not, for a boat line which is accorded a monopoly of the through rail-and-water traffic will soon be able to drive its competitors out of business." *Pac. Navigation Co.* v. *Southern Pacific Co.*, 31 I. C. C. 472, 479.

We cannot agree with the contention that the Commission has less power now to protect water carriers than it had in 1914.[5] The 1949 Act was intended, together with the old law, to provide a completely integrated interstate regulatory system over motor, railroad, and water carriers. In the light of its declared policy, and because of its provisions hereafter noted, we think railroads are under a duty to provide interchange of cars with water carriers to the end that interstate commerce may move without interruption or delay. Cf. *Flour City S. S. Co.* v. *L. V. R. Co.*, 24 I. C. C. 179, 184.

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[5] This argument rests on a historical analysis of provisions in the original Act and later amendments which impose specific duties as to car interchanges. A detailed and clear narrative of the history appears in the opinion of the District Court. 55 F. Supp., *supra*, 479-483. In summary the argument is this. The original 1887 Act applying only to railroads, 24 Stat. 379, required in Section 3, an "interchange of traffic" but did not specifically provide for an interchange of cars. The Hepburn Amendment of 1906, 34 Stat. 584, subjected water carriers to the Act so far as they connected with railroads in interstate commerce, defined transportation to include "cars" and "facilities," and made it the duty of railroads to establish through routes. The Mann-Elkins Amendment of 1910, 36 Stat. 539, 545, required carriers to make reasonable rules and regulations to provide for "exchange, interchange, and return of cars" used on through routes. The Esch Car Service Act of 1917, 40 Stat. 101, again required interchange of cars, and specifically gave the Commission power to establish rules to enforce the requirement. The Transportation Act of 1920, 41 Stat. 456, 476, omitted the exact language of the car interchange requirement which had appeared in the 1910 Mann-Elkins Amendment, but substituted for it Sections 1(10) (11) (13) and (14) which contained more elaborate language imposing still more specific duties in this respect. These "car service" provisions were not changed by the 1940 Transportation Act. The Mann-Elkins and the Esch Car Service Amendments, however, had made

Sec. 1(4) of Part I of the Act imposes a duty on railroads to establish reasonable through routes with other carriers, including water carriers, and to "provide reasonable facilities for operating such routes"[6] under "reasonable rules and regulations."

Sec. 3(4) makes it the duty of railroads to "afford all reasonable, proper, and equal facilities for the interchange of traffic between their . . . lines and connecting lines, and for . . . forwarding . . . of . . . property to and from connecting lines," and a "connecting line" is defined to include a water carrier.

Section 15(3) supplements these sections by providing that the Commission may hold hearings, and "shall" if it

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the car interchange provisions applicable to every "carrier subject to the provisions of this Act." The 1920 Act made the car service provisions applicable to "carriers by railroad subject to this Act"; the 1940 Act made them applicable to a "carrier by railroad subject to this part." The argument is that these changes, made in the 1920 and carried into the 1940 Act, show a continuing purpose of Congress to deprive the Commission of the power to require interchange of cars with water carriers—to detract from its authority. But we have already had occasion to say that the 1920 Act "materially extends the jurisdiction of the Commission in respect of land-and-water transportation and the carriers engaged in it, whenever property may be or is transported by rail and water by a common carrier or carriers . . . ." Chicago, R. I. & P. Ry. Co. *v.* United States, 274 U. S. 29, 36. This conclusion as to the scope of the 1920 Act is fully justified by its history, 206 I. C. C. *supra*, 339-343. Consequently, the 1920 changes in the language of the car service requirements do not justify the narrow interpretation of the 1940 Act which is here urged.

[6] As to cars being "facilities," see Sec. 1(3)(a) of the Act, and Assigned Car Cases, 274 U. S. 564, 575, 580; Tank Car Corp. *v.* Terminal Co., 308 U. S. 422, 428.

deems it "necessary or desirable in the public interest, . . . establish through routes . . . and the terms and conditions upon which such through routes shall be operated."

These sections provide sufficient authorization for the Commission's order. It was from its power to require through routes that the Commission originally derived its power to require interchange of railroad cars among connecting railroads.[7] Since a rail-water through route with Seatrain cannot function without an interchange of cars, the unquestioned power of the Commission to require establishment of such routes would be wholly fruitless, without the correlative power to abrogate the Association's rule which prohibits the interchange.

Second. It is contended, and the court below held, that if the Commission has power to require railroads to interchange cars with through route connecting water carriers, it is without power to do so if a route traverses, in part, foreign waters, as Seatrain's does. This contention basically rests on paragraphs (1) and (2) of Section 1 of the Interstate Commerce Act, as amended by Sec. 400 of the 1920 Act, 41 Stat. 474, left unchanged by Part I of the 1940 Act. The language relied upon in these paragraphs declares that the provisions of Part I, relating to railroads and their transportation, shall apply "only insofar as such transportation takes place within the United States." Limiting language to the same effect is contained in the water carrier regulatory provisions of Par III of the 1940 Act.[8]

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[7] See note 3.

[8] Sec. 302 (i) (2) of the Act provides that the transportation subject to regulation is that " . . . partly by water and partly by railroad or motor vehicle, from a place in a State to a place in any other State; except that with respect to such transportation taking place partly in the United States and partly outside thereof, such terms shall include transportation by railroad or motor vehicle only insofar as it takes place within the United States . . . ."

This Court has stated that the 1920 Act, containing this limiting clause "applies to international commerce only insofar as the transportation takes place in the United States." *Lewis etc., Co.* v. *Southern Pac. Co.*, 283 U. S. 654, 660. The question in that case was as to joint through railroad rates over a railroad route partly in the United States and partly in Mexico. The Court further said as to this situation that "The Act does not empower the Commission to prescribe or regulate such rates."[9] In *St. Louis, etc., Ry.* v. *Brownsville District*, 304 U. S. 295, this Court was called upon to consider whether, under the 1920 Act, there was a duty on the part of American railroads to furnish cars for transportation on a Mexican railroad. It was there held that in the absence of a discrimination against shippers, places, or classes of traffic within the United States, American railroads were "not bound by any law, regulation or tariff to furnish cars for transportation in Mexico." These decisions simply meant that whatever power Congress might have to regulate the conduct of its domestic companies doing business abroad,[10] it had, by the limiting provisions of the 1920 Act, expressed its purpose not to empower the Commission with general authority to regulate rail transportation in foreign countries.

But these interpretations of the 1920 Act concerning rail transportation outside the United States are of dubious relevance to the instant case. For Congress has, in Sec. 15(3) of the 1940 Act, unequivocally granted to the Commission the power to establish through joint rail-water routes, and Sec. 302(i)(2) makes this power applicable to such routes "from a place in the United States to another place in the United States.'"[11] Cf. *Cornell Steamboat Co.* v. *United States,* 321 U. S. 634. The reason for this grant of authority to the Commission is apparent. It is well known that a substantial part of intercoastal and lake transportation among the states, in which American companies engage, traverses waters outside of the territorial limits of the United States. Foreign countries have not the same interest in this purely domestic carriage of goods, as they have in controlling the movement of railroads in their territory.[12] Such transportation must be regulated by this country if it is to be effectively regulated. Congress recognized this fact when it made special provision in Section 15(3) for the Commission to regulate water transportation from one to another place in the United States, even though that transportation took place "partly outside" the United States. It is this particular provision, made especially applicable to interstate *rail-water* transportation, by which the Commission's authority over such movements must be measured, rather than by the limiting clause of Section 1, which is applicable to the Commission's power over *railroad* transportation. There is therefore nothing in the Act to deny the Commission the same power over interstate water-rail transportation which passes through foreign waters, as we have just held it enjoys where the transit is wholly within the territorial limits of the United States. We therefore hold that the order of the Commission requiring car interchanges was within its authority as to interstate movements which take place within or without the territorial waters of the United States.[13]

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[9] Notwithstanding this, however, the Court held that where such joint rates were voluntarily fixed and charged by an American railroad, the Commission could, under the power given it by the 1920 Act, pass upon the reasonableness of the joint international rate.

[10] See Knott *v.* Botany Mills, 179 U. S. 69; Cunard S. S. Co. *v.* Melon, 262 U. S. 100, 129.

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[11] The Commission denied Seatrain's petition insofar as it asked an order requiring railroads to interchange their cars for the purpose of handling freight to Cuba. 206 I. C. C. *supra,* 337; 248 I. C. C. *supra,* 118-119.

[12] Section 1(1)(a) of Part I of the Act which contains the general clause limiting the Act's application to railroad transportation within the United States, also declares its application to transportation "from any place in the United States *through a foreign country* to any other place in the United States." This latter clause, as the District Court recognized, 55 F. Supp. *supra,* 487, would have little meaning, if the limiting clause were given the interpretation for which the railroads here contend.

Third. The Commission found that $1.00 per car per day, to be paid to the car owners while Seatrain actually had cars in its possession, was a reasonable compensation. Although, in practice, cars brought to the ports must sometimes wait several days for Seatrain's sailing, the Commission did not require Seatrain to make per diem payments during this waiting period. It is contended that the Commission should require Seatrain to pay for the cars from the time they are made available to it; that the rate of compensation was too low; and that in both respects, the result is to require railroads to afford Seatrain the "free use" of their property, thereby imposing a burden upon the railroads which Congress neither did nor could have authorized. *Chicago R. I. & P. Ry. Co.* v. *United States*, 284 U. S. 84, 97.

The questions thus raised depend upon a determination of facts. The findings of the Commission, discussed at length in its opinions, illustrate the complex nature of the facts involved. 237 I. C. C. 97, 101-102; 248 I. C. C. 109. Those facts need not be repeated here. The Commission not only had the benefit of the testimony offered in these proceedings, but was possessed of wide experience with the general problem of car hire. See e. g. Rules for Car Hire Settlement, 160 I. C. C. 369. We have carefully examined the record and find substantial evidentiary support for the Commission's finding "that the current code of per diem rules governing the interchange of freight cars between the defendants above referred to and other rail carriers, including the current rate of $1.00 per day payable by Seatrain for such period as the cars are in its actual possession, would be reasonable for application to the interchange of cars between defendants and complainants for use by Seatrain." 248 I. C. C. at 119. This being true we sustain the Commission's order in this respect.[14]

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[13] We have not overlooked the argument that Congress intended to take away part of the Commission's power over car interchanges by repealing subdivision (b) of Sec. 6(13) of the Act to Regulate Commerce as amended, 37 Stat. 560, which reads as follows: "To establish through routes and maximum joint rates between and over such rail and water lines, and to determine all the terms and conditions under which such lines shall be operated in the handling of the traffic embraced."

This repealed provision was substantially embodied in 15(3) of the 1940 Act. We think Commissioner Eastman, then Chairman of the Legislative Bureau, made an accurate statement, when in writing the Senate-House Conference Committee considering the 1940 Act, he stated that he did not object to the repeal of 13(b) since "Other provisions of the bill adequately cover this matter." Omnibus Transportation Legislation, House Committee Print, 76th Congress, 3d Session, p. 23.

We find no merit in any of the other contentions raised against the order of the Commission.

The judgment in No. 47 is reversed, and the judgment in No. 48 is affirmed.

It is so ordered.

Mr. Justice **Roberts** dissents.

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[14] It is to be noted that the Commission has not foreclosed future consideration of the car hire compensation problem, insofar as it may be involved in determining railroad rates or a proper division of through rail water rates between Seatrain and the railroads. 248 I. C. C. 117; cf. Chicago R. I. & P. Ry. Co., *supra*, 97, 109, note 11.

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MAR 5 1953
HAROLD B. WILLEY, Cl

APPENDICES C, D and E
(To Reply Brief)

IN THE

Supreme Court of the United States

October Term, 1952

No. 497

SEATRAIN LINES, INC.,

Petitioner,

vs.

PENNSYLVANIA RAILROAD COMPANY, ATLANTIC COAST LINE RAILROAD COMPANY, LOUISVILLE & NASHVILLE RAILROAD COMPANY, SOUTHERN RAILWAY COMPANY, BALTIMORE AND OHIO RAILROAD COMPANY, SEABOARD AIR LINE RAILROAD COMPANY, ERIE RAILROAD COMPANY, ASSOCIATION OF AMERICAN RAILROADS,

Respondents.

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APPENDIX C

BEFORE THE

Interstate Commerce Commission

DOCKET NO. 31177

IN THE MATTER OF THE PETITION OF SEATRAIN LINES, INC. FOR THE ISSUANCE OF DECLARATORY ORDERS UNDER SECTION 5(d) OF THE ADMINISTRATIVE PROCEDURE ACT

BRIEF ON BEHALF OF THE ALABAMA GREAT SOUTHERN RAILROAD COMPANY, ATLANTIC COAST LINE RAILROAD COMPANY, THE BALTIMORE AND OHIO RAILROAD COMPANY, CHARLESTON & WESTERN CAROLINA RAILWAY COMPANY, THE CINCINNATI, NEW ORLEANS AND TEXAS PACIFIC RAILWAY COMPANY, ERIE RAILROAD COMPANY, LOUISVILLE AND NASHVILLE RAILROAD COMPANY, NEW ORLEANS & NORTHEASTERN RAILROAD COMPANY, THE PENNSYLVANIA RAILROAD COMPANY, SEABOARD AIR LINE RAILROAD COMPANY AND SOUTHERN RAILWAY COMPANY, COMPLAINANTS IN DOCKET NUMBER 31014

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Appendix C

BEFORE THE

INTERSTATE COMMERCE COMMISSION

DOCKET NO. 31177

IN THE MATTER OF THE PETITION OF SEATRAIN LINES, INC. FOR THE ISSUANCE OF DECLARATORY ORDERS UNDER SECTION 5(d) OF THE ADMINISTRATIVE PROCEDURE ACT

BRIEF ON BEHALF OF THE ALABAMA GREAT SOUTHERN RAILROAD COMPANY, ATLANTIC COAST LINE RAILROAD COMPANY, THE BALTIMORE AND OHIO RAILROAD COMPANY, CHARLESTON & WESTERN CAROLINA RAILWAY COMPANY, THE CINCINNATI, NEW ORLEANS AND TEXAS PACIFIC RAILWAY COMPANY, ERIE RAILROAD COMPANY, LOUISVILLE AND NASHVILLE RAILROAD COMPANY, NEW ORLEANS & NORTHEASTERN RAILROAD COMPANY, THE PENNSYLVANIA RAILROAD COMPANY, SEABOARD AIR LINE RAILROAD COMPANY AND SOUTHERN RAILWAY COMPANY, COMPLAINANTS IN DOCKET NUMBER 31014

I. Statement

A. *Nature of This Proceeding*

In this proceeding Seatrain Lines, Inc. (hereinafter called Seatrain) asks the Commission, in the exercise of powers said to be vested in it by Section 5(d) of the Administrative Procedure Act, to issue declaratory orders answering the following questions:

1. Has this Commission authority, and if so, under what specific provisions of the Interstate Commerce Act to require railroads which do not participate in and maintain through routes with Seatrain to permit interchange of their freight cars with Seatrain and permit the use of such freight cars in connection with transportation via Seatrain in Interstate Commerce.

2. Has this Commission authority, and if so, under what specific provisions of the Interstate Commerce Act, to award reparation for damages resulting from the utilization of available administrative and court procedures in bad faith or without probable cause.

B. *Statute Involved.*

There is set out below the relevant portion of Section 5 of the Administrative Procedure Act.

> "Sec. 5. In every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing, except to the extent that there is involved (1) any matter subject to a subsequent trial of the law and the facts de novo in any court; (2) the selection or tenure of an officer or employee of the United States other than examiners appointed pursuant to section 11; (3) proceedings in which decision rest solely on inspections, tests, or elections; (4) the conduct of military, naval, or foreign affairs functions; (5) cases in which an agency is acting as an agent for a court; and (6) the certification of employee representatives—

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* * * *

> (d) The agency is authorized in its sound discretion, with like effect as in the case of other orders to issue a declaratory order to terminate a controversy or remove uncertainty."

C. *Questions Presented*

The Commission's order of December 24, 1952, after stating the two questions raised in Seatrain's petition, provides:

> "That briefs in support of or in opposition to the relief sought in the said petition may be filed on or before January 30, 1953, and that replies thereto may be filed on or before February 20, 1953."

The precise question presented by Seatrain's petition and by the Commission's order is whether the relief sought by Seatrain should be granted, that is, whether the Commission should issue declaratory orders dealing with the two questions of law stated in Seatrain's petition. Accordingly, this brief is confined to a discussion of that question; the brief does not discuss the nature of the answers that the Commission might give to the two questions in the event that it decides to issue the orders prayed for. As we point out at pp. 34-37, *infra,* even if the Commission should decide to issue the declaratory orders sought, it could not properly do so until there had been a full hearing on the facts that underlie the questions. We assume, therefore, that if the Commission decides to issue the orders prayed for, it will do so only after such full hearing. Since this brief is confined to the question whether the Commission should issue the declaratory orders sought, we hereby respectfully request that if the Commission should decide to issue the declaratory orders we be given an opportunity to file an additional brief dealing with the substance of the questions stated. In that brief we would contend: (1) that the Commission has plenary authority over the matter of car interchange and that, accordingly, it has the authority to require railroads which do not participate in and maintain through routes with Seatrain to permit interchange of their freight cars with Seatrain provided that the facts before the Commission will support the findings that are necessary for the exercise of that authority, and (2) that the Commission has authority to award reparation for all damages caused by violations of the Interstate Commerce Act, but that Seatrain's question with respect to abuse of process cannot properly be answered in the abstract but must be answered in terms of specific acts said to be unlawful and in terms of specific damage said to have been caused by those acts.

So far as concerns the present issue, it is our position that the Commission should refuse the declaratory orders sought on the following grounds:

A. The Commission should not issue the declaratory orders sought because Seatrain itself has submitted both questions to a court of competent jurisdiction in an anti-trust suit, and that court has disposed of the questions and its decision is now in the course of appellate review.

B. Section 5(d) of the Administrative Procedure Act does not authorize the declaratory orders sought because they would not terminate any actual controversy.

C. Section 5(d) was not intended to authorize orders of the Commission which would determine a part of the controversy only.

D. Section 5(d) of the Administrative Procedure Act empowers the Commission to issue declaratory orders only after opportunity for hearing.

E. The Commission may determine, after hearing, that the questions posed by the petition do not require answers.

F. The Commission should not answer the questions posed by Seatrain until after hearing because the reach of its jurisdiction is governed by considerations which can only be determined concretely and not in abstraction.

D. *The Relationship Between This and Other Proceedings*

Seatrain's petition is an attempt to obtain from this Commission declaratory rulings on questions of law which Seatrain itself has submitted to the courts for decision in antitrust litigation and which are now awaiting appellate review. To the limited extent that the petition can be regarded as raising any questions that might justify a decision by this Commission, the petition is unnecessary because other proceedings are already pending before the Commission in which those questions can more properly be decided. The relationship between the petition and the antitrust litigation and between the petition and other proceedings before the Commission will appear from the following narrative.

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Seatrain, on December 10, 1951, filed in the United States District Court for the District of New Jersey an elaborate complaint seeking treble damages under the antitrust laws against four railroads[1] and injunctive relief against them as well as against seven other railroads[2] and seven railroad associations and committees.[3] That complaint alleged, in summary that defendant railroads: (1) had refused to allow Seatrain use of freight cars, or to enter into appropriate arrangements for their interchange; (2) had refused to enter into through routes or to agree upon joint rates and divisions with Seatrain; (3) had refused to enter into collateral arrangements, involving switching, credit arrangements and billing, issuance of bills of lading and settlement of claims; (4) had established rates which favored Seatrain's competitors and had discouraged and hampered shipments via Seatrain; (5) had disparaged to shippers the service offered by Seatrain, and had harrassed

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[1] The Pennsylvania Railroad Company, Atlantic Coast Line Railroad Company, Southern Railway Company and the Louisville & Nashville Railroad Company. These were designated in the complaint as the "primary defendants."

[2] The Lehigh Valley Railroad Company, Baltimore & Ohio Railroad Company, Seaboard Air Line Railroad Company, St. Louis-San Francisco Railroad Company, New York Central Railroad Company, Erie Railroad Company and the Delaware Lackawanna & Western Railroad Company.

[3] The Association of American Railroads, President's Traffic Conference—Eastern Railroads, Traffic Executive Association—Eastern Railroads, General Freight Traffic Committee—Eastern Railroads, Freight Traffic Committee—New England Territory Railroads, Freight Traffic Committee—Trunk Line Territory Railroads and the Freight Traffic Committee—Central Territory Railroads.

Seatrain by litigation and administrative proceedings not conducted in good faith. The complaint further alleged that the defendant associations had been used as vehicles to reach these ends and that at all of this had been undertaken pursuant to a general and continuing conspiracy among the defendants and other railroads "too numerous to mention."

Since the filing of the complaint Seatrain had entered voluntary dismissals against the Lehigh Valley, St. Louis-San Francisco, New York Central and Delaware, Lackawanna & Western Railroad Companies, and the railroad associations, other than the Association of American Railroads, and has also abandoned many of the alleged grounds of its complaint. Its reliance in presentation of the matter to the District Court was exclusively on the grounds of alleged discrimination in car interchange and abuses of Commission and court processes.

Several of the railroad defendants while moving to dismiss the complaint in the District Court, felt an obligation to go beyond a merely negative resistance to Seatrain's efforts to litigate, in a suit under the antitrust laws, a group of issues presenting complex problems in transportation economics and commerce law. They felt that the long standing disputes between Seatrain and the railroads should receive speedy and final resolution. They believed, however, that final resolution of those issues could be accomplished only by the Interstate Commerce Commission, the agency vested with statutory authority, and qualified by special experience to deal with those issues.

These railroads, accordingly, on March 26, 1952, filed with the Commission a broadly based complaint. A copy is included as Exhibit D to the instant petition. That complaint asks a comprehensive examination of or reexamination of the many issues which have been in almost continuous controversy between Seatrain and the railroads and a resolution of those issues by the Commission. After repeated extensions of time to plead, granted at its request, Seatrain on December 10, 1952, filed a lengthy answer to this complaint. Hearings have not as yet been scheduled.

On April 14, 1952, argument was had before Chief Judge Forman on motions to dismiss the antitrust complaint. Those motions advanced the following grounds for dismissal: (1) the matters complained of fell within the jurisdiction of this Commission, (2) the suit was barred by Section 6 of the Clayton Act, and (3) the complaint failed to state a claim upon which relief could be granted. Argument was had at the same time on the plaintiff's motion for preliminary injunction.

On October 24, 1952 Judge Forman filed a careful opinion holding that the matters complained of were within the primary jurisdiction of the Interstate Commerce Commission or were subsidiary matters incidental to the principal allegations of the complaint and so insufficient to confer jurisdiction upon the court. In reliance upon *Far East Conference* v. *United States,* 342 U. S. 570, 576-577, the Court denied the plaintiff's motion for a preliminary injunction and dismissed the complaint. It expressly noted that Seatrain could obtain all the relief it sought in Docket No.

31014, the pending proceeding before the Commission, saying:

> "All of the railroads which have or might have through routes with Seatrain, or which might own cars that might be interchanged with Seatrain, are made formal defendants in this proceeding. There would appear to be no reason why the allegations of Seatrain, as set forth in the complaint in this suit, may not be projected before the Commission in the course of its hearing and investigation of the above petition pending before it."

Notice of appeal from Judge Forman's orders was filed by Seatrain on November 21, 1952, and the appeal docketed in the Court of Appeals for the Third Circuit on November 25, 1952. On December 11, 1952 Seatrain filed in the Supreme Court a petition for certiorari before the rendition of judgment in the Court of Appeals. See 28 U. S. C. 1254(a). Attached as an appendix to the petition for certiorari was its petition to the Commission for declaratory orders to which this brief is addressed. The petition for certiorari is still pending.

In summary, then, there is now pending before the Third Circuit on appeal, and before the Supreme Court on petition for certiorari, proceedings which seek in those courts adjudication of the same issues presented here. There is now pending before the Commission a broad-based complaint seeking definitive adjudication of the long standing and extensive controversies existing between Seatrain and the railroads. That complaint raises the car service issue and asserts the Commission's jurisdiction to settle that issue in broadest terms. Seatrain could raise in those proceedings the question of whether it is entitled to reparations because of past deprivation of any rights, including car-interchange rights, to which it is entitled under the Interstate Commerce Act. There has been no opportunity as yet for an agency hearing on that complaint. The instant proceeding is brought independently of that other pending proceeding. The instant proceeding will neither terminate nor remove uncertainty in that pending controversy or in any actual case or controversy before the Commission required to be determined on the record after opportunity for hearing. The actual controversy, pending on the railroads' broad-based complaint to the Commission, might well be resolved by the Commission without need of reaching the questions presented for declaratory orders. Basically, then, it would appear that this petition seeks not to terminate a controversy by Commission adjudication but to secure from the Commission an unsought advisory opinion for use in the Supreme Court in the antitrust case.

II. ARGUMENT

A. *The Commission Should Not Issue the Declaratory Orders Sought Because Seatrain Itself Has Submitted Both Questions to a Court of Competent Jurisdiction in an Anti-trust Suit, and That Court Has Disposed of the Questions and Its Decision is Now in the Course of Appellate Review.*

Immediately before argument upon the motions to dismiss its complaint, Seatrain withdrew all of its prayers for relief except those directed against (1) the alleged concerted exclusion of Seatrain from the benefits of the railroads' joint arrangements for the use and interchange of freight cars and (2) the alleged concerted use by the defendants of certain unfair competitive practices, specifically the alleged abuse of administrative and court procedures for the purpose of depriving Seatrain of its rights under the Interstate Commerce Act and injuring its business. Even this more modest attempt to transfer to the courts matters properly within the Commission's jurisdiction proved unsuccessful. On the first issue, the Court held that the scope of the Commission's authority over car interchange was sufficiently broad to afford Seatrain whatever relief it could prove was necessary. On the second, in obedience to the rule of *U. S. Navigation Co.* v. *Cunard S. S. Co.*, 284 U. S. 474, 480, 485, it held that the inclusion of corollary and minor allegations of misconduct, even if the Commission had no jurisdiction over them, did not warrant the retention of jurisdiction by the Court where the "dominant facts alleged" were clearly matters for the Commission to decide.

Seatrain then embarked upon a novel and ambitious course. It decided to seek simultaneous reversal of the district court from the Supreme Court and from this Commission. To this end it filed its appeal to the Court of Appeals for the Third Circuit and then its petition for certiorari, before judgment by the Court of Appeals, in the Supreme Court, and, at the same time filed this petition to the Commission. The issues raised by these two petitions are identical. This is most easily demonstrated by a direct comparison of the questions presented in its petition for certiorari and in this petition for declaratory orders

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"Questions Presented" in Petition For Certiorari to the United States Supreme Court No. 497 October Term 1952.	Questions Submitted in Petition For Declaratory Orders to the Interstate Commerce Commission, Docket No. 31177.
1. Whether the District Court erred in holding that the Interstate Commerce Commission has jurisdiction to require a railroad to permit the interchange and use of its cars in the transportation of freight in interstate commerce by a water carrier when such railroad does not participate in and maintain through routes with such water carrier, it appearing that the Interstate Commerce Commission had already decided in proceedings between the same parties that its jurisdiction to require such interchange and use was limited to cars of railroads participating in and maintaining through routes with such water carrier.	2. Has the Interstate Commerce Commission the requisite authority, and if so under what specific provisions of the Interstate Commerce Act, to require railroads which do not participate in and maintain through routes with Seatrain to permit interchange of their freight cars with Seatrain and permit the use of such freight cars in connection with transportation via Seatrain in interstate commerce?
2. Whether the District Court erred in holding that the Interstate Com-	1. Has the Interstate Commerce Commission the requisite authority, and

merce Commission has jurisdiction to award reparation for the damages caused petitioner by respondents' use of unfair competitive practices not prohibited or declared to be unlawful or otherwise mentioned in the Interstate Commerce Act. This question is squarely raised by the allegation (Doc. No. 4 at pp. 37-39) that defendants have utilized available administrative and court procedures, in bad faith or without probable cause, knowingly or recklessly misrepresenting facts therein, making misleading statements of fact therein, multiplying and protracting proceedings thereunder, in bad faith or without probable cause, not to obtain settlement of issues, but with the intended effect of continuing and creating doubts and uncertainties, all for the purpose of preventing future diversion of all-rail traffic to petitioner.

if so under what specific provisions of the Interstate Commerce Act, to award reparation for damages resulting from the utilization of available administrative and court procedures, in bad faith or without probable cause, knowingly or recklessly misrepresenting facts therein and making misleading statements of facts therein, multiplying and protracting proceedings thereunder, in bad faith or without probable cause, not for the purpose of obtaining settlement of issues but with the intended effect of continuing and creating doubts and uncertainties, all for the purpose of preventing future diversion of all-rail traffic to Seatrain?

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In these circumstances, we suggest that the Commission ought not to make haste to decide issues now before the courts but rather, on the basis of established principles of comity, ought to refuse to decide such issues which they are properly pending on appeal before the Third Circuit.

That these questions are concurrently presented to two tribunals is, of course, occasioned solely by Seatrain's deliberate choice. A year ago, if it felt that the railroads were not fulfilling their legal obligations, it had the option of seeking relief from the Commission. The Commission was already familiar with much of the background of the Seatrain-railroad controversy. It had, indeed, in an earlier proceeding, expressly invited Seatrain to return to it should further orders be necessary. *Seatrain Lines, Inc.* v. *Akron C. & Y. Ry.*, 226 I. C. C. 7, 29. It had, we believe, as the district court has already held, jurisdiction over Seatrain's complaints sufficiently broad in scope to remedy any that could be justified. Seatrain chose instead to seek to remove this complex controversy from the Commission to the district court and to attempt to have it solved under the antitrust laws instead of the Interstate Commerce Act.

As to matters in which it had previously obtained relief from the Commission, Seatrain asked the district court to expand and amend that relief and to add the sanctions of contempt. As to matters in which the Commission had denied relief, it asked the court by injunction to give the very relief the Commission had refused. It asked, in cases where the Commission clearly has reparation jurisdiction, and even in cases where the Commission had exercised that jurisdiction by denying Seatrain's claims for reparation, that the court award it treble damages under the antitrust laws. It asked that the court decide issues under the Interstate Commerce Act which had never been submitted to the Commission but which lie within its jurisdiction. Prior to argument and decision of motions to dismiss it modified its prayers for relief somewhat but persisted in its decision to seek relief from the courts rather than from the Commission.

The district court wisely refrained from taking jurisdiction over this dispute and agreed with the defendants that the proper tribunal, if relief was in order, was this Commission. Seatrain has appealed that decision of the district court. It now seeks to enlist the support of the Commission in this attempt to invest the courts with regulatory authority over this important segment of our transportation system.

The courts and the administrative agencies "are to be deemed collaborative instrumentalities of Justice, and the appropriate independence of each should be respected by the other. . . ." *United States* v. *Morgan,* 313 U. S. 409, 422.

In amplification of this general principle, judicial doctrines of restraint have developed by means of which premature decisions by the courts of problems pending before administrative agencies have been prevented. The most familiar are described shortly as the "primary jurisdiction" and the "exhaustion of administratve remedy" doctrines. See e.g., *Texas & Pacific Ry.* v. *Abilene Cotton Oil Co.,* 204 U. S. 426, 439-411; *Far East Conference* v. *United States,* 342 U. S. 570, 576-577; *Pittsburgh C. C. & St. L. R. Co.* v. *Board of Public Works,* 172 U. S. 32, 44-45; *Myers* v. *Bethlehem Shipbuilding Corp.,* 303 U. S. 41, 51; *McCauley* v. *Waterman S. S. Corp.,* 327 U. S. 540, 543-544.

Similar respect is certainly due the courts from the administrative agencies. Where matters are pending before a court whose jurisdiction to decide them is clear, the avoidance of unseemly conflict calls for restraint on the part of an administrative agency to which similar issues are presented after they have already been entertained though not yet finally resolved by the courts.[4]

The Commission was presented with a similar situation in *Express Contract 1929*, 275 I. C. C. 739. The United States in the fall of 1948, filed an antitrust suit against the Railway Express Agency. The Agency answered the complaint on December 30, 1948, including in its answer a motion to dismiss or stay the proceedings on the ground that the Commission had primary jurisdiction of the issues and that the Commission had approved under Section 5 of the Interstate Commerce Act the exclusive features of the agreeement attacked by the Government. On March 31, 1949, the Agency petitioned the Commission asking that it clarify its earlier orders or alternatively that it expressly approve the agreement. Shortly thereafter the Agency called up for hearing its motion in the District Court to dismiss or stay. The United States moved for judgment on the pleadings on April 18, 1949.

The Commission on May 9, 1949, ordered the Agency petition held in abeyance pending the determination of the motions before the District Court. 275 I. C. C. at 741. Those motions were finally decided on April 3, 1950. The Commission reopened its proceedings on May 18, 1950 and then considered, in normal course, the issues presented by the Agency petition.

This does not mean to say that where the questions presented to the Court can best be answered in the light of expert judgment regarding administrative problems, it is not appropriate for the Court to seek the Commission's advice. But where, as here, the issue is one of statutory construction, a question of law, there can be no doubt of the Court's right to decide the issue for itself. See *Great Northern R. Co.* v. *Merchant's Elevator Co.,* 259 U. S. 285, 294-295, n. 2. Nor do we mean to say that settled administrative construction may not be an appropriate consideration for the Court in deciding a question of the Commission's jurisdiction. If the Court sought the Commission's advice in this regard, it might appropriately give that advice. Here, however, the Commission's own reports indicate conflict respecting its authority over car service and the Supreme Court has spoken on the subject basing the Commission's jurisdiction on broadest grounds.

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[4] In re *Electric Bond & Share*, 80 F. Supp. 795 (S.D. N.Y.) held that where neither the court nor the agency had exclusive jurisdiction, it was proper for the issues to be decided by the tribunal whose jurisdiction was first in time.

In *Hoboken Mfrs. Co.* v. *Abilene & S. Ry. Co.,* 237 I. C. C. 97; 248 I. C. C. 109, the Commission found that it had jurisdiction to order car interchange with Seatrain. It found, however, that that power was derived, by necessary implication, from its authority to prescribe through routes and provide for the necessary facilities to insure unobstructed movement of traffic over such routes. It found, in consequence, that the extent of its authority was limited accordingly. However, the Commission has not persisted in this earlier view. Seatrain's principal complaint regarding car interchange is directed against Car Service Rule No. 4. This provides:

> "Cars of railway ownership must not be delivered to a steamship, ferry or barge line for water transportation without permission of the owner filed with the Car Service Division."

The Commission has exercised plenary powers, derived from the Car Service provisions of the Act to suspend the application of this rule. At the request of the War Shipping Administration, which had requisitioned the vessels of Seatrain, the Commission on May 22, 1942, entered Service Order No. 75. This suspended Rule 4 insofar as it applied to operations of vessels controlled and operated by or for the account of the War Shipping Administration. In effect, this order required that the cars of all railroads, whether consenting or not, whether having through routes with Seatrain or not, should be available for interchange with Seatrain vessels. Service Order No. 75-A, issued August 14, 1942, reinstated Car Service Rule 4. This, by necessary implication, constituted recognition by the Commission that the Rule was not unreasonable and was an assertion of its power to determine the reasonableness or unreasonableness of the rule.

These orders do not state expressly which sections of the Act furnish the authority for their issuance. It seems reasonably clear, however, and indeed Seatrain has so argued to the district court, that this action was taken under Section 1(15) of the Act.[5] Unless therefore the emergency powers granted the Commission by this section are substantively greater than its powers under the other car service provisions, it is clear that the Commission may, if necessary, take similar action after appropriate notice and hearing in the absence of an emergency.

Section 1(15), at least so far as concerns car service, simply affords the Commission the opportunity to by-pass the usual provisions of notice and hearing in the event of emergency. Any action which it can take under 1(15) can be accomplished after hearing by the establishment of new rules, regulations and practices under Section 1(14). Moreover, by directing under Section 1(13) that the current rules be incorporated in the carriers' schedules of rates, fares and charges, these rules may be suspended by the exercise of Commission power under Section 15(7) and modified under Section 15(1) to the extent they are found unreasonable. While Section 1(15) is not in terms limited to "carriers by railroad," as is the case with Sections 1(10)-1(14), this does not mean that this reflects a Congressional intention to give this section a wider applicability. Section 1(17)(a) makes clear that orders of the Commission under Section 1(15) are to be directed only to those carriers subject to the other car service provisions of the Act. Section 1(17)(a) provides "it shall be the duty of call *carriers by railroad subject to this part* . . . to obey strictly and conform promptly" to the directions of the Commission issued under its emergency powers. In short Section 1(15) does no more than provide expedited procedures, in the case of emergency. Pursuing the more safeguarded procedures of the other sections. the Commission could reach the same result as by the exercise of its powers under 1(15).[6]

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[5] The preamble to Service Order No. 75, for example, speaks of the existence of the emergency resulting from the state of war. Service Order No. 75-A was issued following the termination of hostilities.

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[6] It is at least arguable that the Commission might find authority to order unrestricted car interchange with Seatrain solely in Section 1(15). While it is true that that section requires the finding of the existence of an emergency, this does not mean that there must be a state of war or a declaration of emergency by the President. The Commission has taken action under this section, for example, where it has found that car shortages alone provided the emergency. See, e.g. *United States* v. *Thompson,* 58 F. Supp. 213 (E.D. Mo.) If the operation of the national freight car pool results in a shortage of cars for use in the Seatrain service, this might well constitute grounds for invoking the 1(15) powers.

Appendix C

The Commission has more recently given indication that it considers its powers regarding car service to be complete. *Car Service, Freight Cars, Docket No. 29669*, 268 I. C. C. 687 was an investigation on the Commission's own motion for the purpose of determining among other things, "whether the rules, regulations, and practices with respect to the use, control, supply, movement, distribution, exchange, interchange, and return of railroad freight carrying cars are unreasonable, or otherwise unlawful." All common carriers by railroad subject to the Interstate Commerce Act were made respondents and there were numerous interventions on behalf of shipper representatives and government agencies. Hearing was held "(1) to devise ways and means of making the best use of the available car supply, and (2) to determine whether this Commission should promulgate car service rules." The Commission made particular reference to Car Service Rules of the Association of American Railroads Nos. 1 to 6, inclusive, "pertaining to the selection of cars to be loaded with shipments destined to points not situated on the originating railroad, and the return of freight cars to their owners when unloaded at points on other lines," and to Per Diem Rule 19, providing for "the creation and maintenance of a car service division" (p. 690).

The Commission (p. 703) found that "the railroad car service rules here under consideration have not been shown to have been or to be unlawful" and it abstained from the promulgation of the Commission rules. It required the carriers to file their rules and regulations with respect to car service under the provisions of Section 1(13) of the Act, and it concluded (p. 704):

> "If it should later appear that conditions might be improved by a modification of, or an addition to, the car-service rules as so filed, action by us with that object in view can be taken (1) informally through conferences with and suggestions to railroad representatives; (2) by the issuance of a service order or orders under emergency powers conferred by Section 1, paragraphs (15) and (16) of the act; or (3) by the entry of an order, after hearing, as authorized by Section 1(14) (a) of the act.
>
> "The proceeding will be held open for a time to facilitate any further action which the instant emergency may warrant."

This proceeding remains open. In it the Commission has indicated its readiness to deal with Car Service Rule 4.

We must conclude then that despite the expressions in the *Hoboken* case, the Commission's own decisions provide precedents for the exercise of authority under the car service provisions of the Act to afford Seatrain relief in respect of car-interchange with the railroads, to the extent that Seatrain can demonstrate that such relief is necessary. Additional support for this conclusion is found also in *United States* v. *Pennsylvania R. Co.*, 323 U. S. 612 which upheld the order of the Commission issued in the *Hoboken* case. A careful reading of that opinion reveals quite plainly that the Supreme Court took a broader view of the scope of the Commission's authority than did the Commission itself.

Three points are to be noted in connection with this opinion:

(a) While the court does not depart from the principle that the statement of policy in the Interstate Commerce Act confers no substantive authority upon the Commission, it states in the most positive terms that the remaining sections of the Act are to be interpreted in the light of that policy. The Court quotes the statement that the Act provides "for fair and impartial regulation of all modes of transportation . . . to the end of developing, coordinating, and preserving the national transportation system by water, highway, and rail, * * * adequate to meet the needs of the commerce of the United States." It goes on to conclude: "In the light of its declared policy, and because of the provisions hereafter noted, we think railroads are under duty to provide interchange of cars with water carriers to the end that the interstate commerce may move without interruption or delay." The sections of the Act to which reference is subsequently made are 1(4), 3(4) and 15(3).

This language strongly implies that if the Commission were to find after full hearing that it was necessary to order unrestricted interchange of freight cars with Seatrain in order to insure that interstate commerce move via Seatrain without interruption or delay, the Commission's powers are adequate to accomplish this purpose of the Act. As the Court put it, "the very complexities of the subject have necessarily caused Congress to cast its regulatory provisions in general terms. Congress has in general left the contents of these terms to be spelled out in particular cases by administrative and judicial action and in the light of the Congressional purpose to foster an efficient and fair national transportation system.

(b) The Court stated that the Seatrain service could not adequately be carried out if it were denied the use of "the very railroad cars which carry freight to its ports." This strongly implies that if existing arrangements are such that traffic moving via Seatrain is frequently carried to the ports in cars owned by railroads not having through routes with Seatrain, the Commission's power is broad enough to require that those cars go forward on the Seatrain vessels.

(c) Finally the Court's opinion confirms the suggestion made above, on the basis of the Commission's order suspending Car Service Rule 4, that authority to order car-interchange with Seatrain may be found in the car service provisions of the Act. The Esch Car Service Act of 1917 had given the Commission express authority to prescribe rules "with respect to car service," that term being defined to include "the movement, distribution, exchange, interchange and return of cars used in the transportation of property by any carrier subject to the provisions of this Act." Water carriers had been brought within the Commission's jurisdiction by Section 6 of the Panama Canal Act of 1912. During the period 1917 to 1920, then, the Commission had plenary power to prescribe rules respecting car interchange between railroads and water carriers necessary to carry out the policy of the Act. The appellant railroads made a careful and well-reasoned argument that the amendments made by the Transportation Act of 1920 which restricted the application of the car service provisions to "carriers by railroad" evidenced a

Congressional intention to withdraw from the Commission its authority to order car interchange with water carriers. They argued also that this statutory restriction upon the Commission's power was continued by the 1940 amendments, at which time Seatrain had already been operating for several years. The Court summarized this argument but rejected it. It said (323 U. S. at 618, fn. 5):

> "We have already had occasion to say that the 1920 Act 'materially extends the jurisdiction of the Commission in respect of land and water transportation and the carriers engaged in it whenever property may be or is transported in interstate commerce by rail and water, by a common carrier or carriers . . .' This conclusion as to the scope of the 1920 Act is fully justified by its history, 206 I. C. C. *supra*, 339-343. Consequently, the 1920 changes in the language of the car service requirements do not justify the narrow interpretation of the 1940 Act which is here urged."

The preceding discussion of the Commission's power over car service leads, we submit, to the following conclusions: There has been no consistent administrative interpretation of the Commission's powers over car service to which the district court should have bowed. In *United States* v. *Pennsylvania R. Co.,* 323 U. S. 612, the Supreme Court considered the general question of the Commission's powers over car service and placed those powers on broad grounds. The general question of the scope of the Commission's powers over car service is a question of statutory construction, that is to say, a pure question of law. In these circumstances, it was entirely appropriate for the district court to decide this issue of law itself, relying heavily upon the Supreme Court's decision in the *Pennsylvania Railroad* case. That decision of the District Court is now on appeal. It can only be a matter of embarrassment to the Commission to attempt, at this point, to deal with these precise questions which are pending before the courts.

B. *Section 5(d) of the Administrative Procedure Act Does Not Authorize the Declaratory Orders Sought Because They Would Not Terminate Any Actual Controversy.*

Section 5(d) of the Administrative Procedure Act was intended to give the Commission, or other agency, powers equivalent to those given to district courts by the Declaratory Judgment Act. This is made abundantly clear by the reports of both the House and Senate and by the statement on the floor of the House by the manager of the Bill.

House report 1980, 79th Congress, second session, includes the following explanation of Section 5(d):

> "Every agency is authorized in its sound discretion to issue declaratory orders with the same effect as other orders.
>
> "This section does not mean that any agency empowered to issue orders may issue declaratory orders, because it is limited by the introductory clauses of section 5 so that such orders may be issued only where the agency is empowered by statute to hold hearings and the subject is not otherwise expressly exempted there. Where authorized to do so by this Section, agencies are not required to issue declaratory orders merely because request is made therefor. Such applications have no greater effect than they now have under existing comparable legislation. "Sound discretion," moreover, would

> preclude the issuance of improvident orders. *The administrative issuance of declaratory orders would be governed by the same basic principles that govern declaratory judgments of the courts. Such orders, if issued, would not bind those not parties to them or determine subject matter not presented. They would be subject to judicial review as in the case of other orders.*" (Emphasis supplied.)

Senate report 952, 79th Congress, second session, includes the following explanation of the Section:

> "(d) DECLARATORY ORDERS. — Every agency is authorized in its sound discretion to issue declaratory orders with the same effect as other orders.
>
> This subsection does not mean that any agency empowered to issue orders may issue declaratory orders, because it is limited by the introductory clauses of Section 5. Thus, such orders may be issued only where the agency is empowered by statute to hold hearings and the subject is not expressly exempted by the introductory clauses of this section.
>
> Agencies are not requred to issue declaratory orders merely because request is made therefor. Such applications have no greater effect than they now have under existing comparable legislation. "Sound discretion," moreover, would preclude the issuance of improvident orders. *The administrative issuance of declaratory orders would be governed by the same basic principles that govern declaratory judgments in the courts.*" (Emphasis supplied)

In the course of Representative Walters' opening remarks which contain his explanation of the bill, he made the following statement (92 Cong. Rec. 5652):

> "The last subsection of section 5 authorized agencies, in their sound discretion, to issue declaratory orders with the same effect as other orders. *Since agencies exercise judicial functions, it has been deemed wise, for the benefit of the public and people subject to administrative adjudications, to confer upon them authority by this subsection to do the same things that courts do under the Declaratory Judgment Act.* In other words, administrative agencies should at least be as free to act irrespective of the technical rules of case or controversy as courts are. Indeed, without this provision, in cases involving administrative powers, there is a blind spot in our law—for parties can neither secure a declaratory order from the administrative agency. Parties faced with a situation in which they desire a declaratory adjudication would under this provision be authorized to ask an agency to rule upon the situation; and the ruling of the agency would be subject to judicial review and all other requirements as in other cases. Administrative authority so to act has been widely urged. This provision, however, narrows the authority to those cases in which agencies act upon a statutory hearing and subject to the safeguards of sections 5, 6, 7, 8, 9 and 11 of this bill." (emphasis supplied).

From this legislative history it would appear quite clear that the requirements of the Declaratory Judgment Act are carried over into Section 5(d) of the Administrative Procedure Act. Under the Declaratory Judgment Act only an actual case or controversy may be the subject of a declaratory judgment. The Court will entertain a complaint if, but only if, there is an actual controversy, it is ripe for decision, and the Court's order will settle the

case. *Alabama State Federation of Labor* v. *McAdory,* 325 U. S. 450, 461; *Coffman* v. *Breeze Corps,* 323 U. S. 316; *Great Lakes Company* v. *Huffman,* 319 U. S. 293, 299-300; *Maryland Casualty Co.* v. *Pacific Company,* 312 U. S. 270-273; *Public Service Com.* v. *Wycoff Co.*. 21 U. S. L. W. 4077.

There is an actual controversy in the antitrust case but a declaratory order of the Commission will obviously not settle it. The Commission has no jurisdiction to overrule the District Court. Its opinon can only be advisory. The Appellate Court would be at liberty to disregard it. And while the Commission may have other sources of power authorizing advisory opinions where properly sought (See *Atlantic Freight Lines, Inc.,* 51 M. C. C. 175) Section 5(d) of the Administrative Procedure Act is not such a source.

There is also an actual controversy pending in *The Alabama Great Southern Railroad Company, et al.* v. *Seatrain Lines, et al.,* Docket No. 31014. Not only has there been no opportunity for hearing, as yet in that controversy, a point discussed below (pp. 34-37 *infra*), but clearly the declaratory orders sought would not terminate that controversy. The abuse of process issue, though mentioned in the Answer, is not before the Commission, Seatrain having sought no relief from the Commission on that account as it might have done by cross complaint. The car service issue is involved in that proceeding. In respect of that issue, the Commission will be required to deal with it, within the scope of its powers, regardless of what that scope is determined to be. Even if the Commission's powers were deemed limited to ordering car interchange in connection with existing or prescribed through routes, the complaint in Docket No. 31014 raises a variety of issues which would still have to be decided within the scope of that power. If the Commission's power over car interchange is as broad as we believe it to be, a declaration of its breadth will not answer the car service issues presented by that complaint. Whatever may be the determination regarding the extent of the Commission's power, the issues presented in Docket No. 31014 can be answered only on the basis of full and careful consideration of the extensive facts and complicated interplay involved in the relations of Seatrain with the railroads.

There are set out below paragraphs 22-27 of the Complaint in Docket No. 31014. These allegations mark the dimensions of the dispute between Seatrain and the railroads regarding car interchange. It will be evident from their reading that, whatever the Commission's powers, that dispute can be fairly answered only in the light of a full hearing. Those allegations make further evident the fact that the questions regarding car interchange can only be answered in reasonable terms if disposed of in conjunction with answers respecting car supply, and appropriate contrbutions to car supply, per diem, proper conditions respecting the establishment of through routes, etc. Paragraphs 22-27 of the complaint in Docket No. 31014 read as follows:

> 22. Seatrain now has unrestricted use of all the railroad freight cars which it needs to handle the traffic it can move or is able to obtain. In respect of such use and in respect of wider use, should the Commission determine that Seatrain should have unrestricted access to the entire freight car supply

of the country, Seatrain should be required to meet its fair obligations in connection with the use and interchange of freight cars and per diem payments therefor. Its present use of and payment for railroad freight cars is an unjust and unreasonable practice in violation of Sections 1(4), 1(11) and 305(b) of the Interstate Commerce Act, and a preferential and discriminatory practice under Sections 3(4) and 305(d) of that Act.

23. Seatrain and the adversary railroad defendants enumerated in subparagraphs (a), (b), (c) and (d) of paragraph 4, by agreement, relieve Seatrain of responsibility for per diem covering detention of cars held by them for it awaiting its acceptance of such cars or acceptance by its immediately connecting railroads. Under Car Service Rule 15, complainants and all other railroads bear the responsibility for per diem covering the detention of cars which they are unable to receive. The agreement of the adversary defendants above-named in this paragraph constitutes unreasonable rules, regulations or preferential and discriminatory practices concerning car service in violation of Sections 1(11) and 3(4) of the Interstate Commerce Act.

24. There has been a car shortage for more than a decade past. In general, and with only minor exceptions, each railroad of the country has attempted to provide a sufficient supply of freight cars to meet loading requirements for the traffic which originates on its line. Seatrain by the nature of its operations originates no traffic. It has over the 20 year period of its operations made no contribution to the freight car supply of the country to compensate for its own extensive use of cars owned by the railroads. It carries therefore none of the substantial risks of

car ownership in periods of slack times, and none of the ownership risks of car damage and cost of repair.

25. Roughly 35 per cent of the freight car movement by railroads is empty movement, either toward a loading point or toward the home road. Per diem is paid on foreign cars moving empty. Seatrain by the nature of its terminal-to-terminal operations has no empty movement toward a loading point. By virtue of the traffic control made possible by Seatrain's permit and embargo system, complained of in paragraph 28 of this complaint, and of the tendency of Seatrain's receiving lines to load for even a short rail movement toward home, Seatrain performs in fact no appreciable movement of empty cars.

26. Railroads subscribing to the Car Service and Per Diem Rules must make direct reports of car detention, and direct payments of per diem, to the car-owning lines. They have bound themselves, moreover, to a variety of reciprocal obligations as to the use and interchange of freight cars. Seatrain has assumed no similar obligations, but it demands and has secured the use of railroad freight cars without assuming any correlative obligation. To require the railroads to furnish cars to Seatrain for its use on more favorable terms and conditions than are exacted of other railroads subscribers to the Car Service and Per Diem Agreement and Interchange Agreement is unduly prejudicial to such other railroads and preferential of Seatrain under Sections 3(1), 3(4) and 305(c) of the Act.

27. The adversary railroad defendants which connect, directly or through switching lines, with Seatrain have regularly delivered to Seatrain freight

> cars belonging to railroads which have not consented under Car Service Rule 4 to the use of their cars by Seatrain. In so doing such defendants have established and observed and are observing an unjust and unreasonable practice contrary to the provisions of Section 1(11) of the Act. Seatrain, moreover, has been and is unlawfully taking and converting to its own use in its service cars of certain of these complainants and of other railroads which have not consented to use of their cars in its service. This is an unreasonable and unlawful practice in violation of Sections 305(a) and 305(d) of the Act.

It is respectfully submitted that the foregoing makes evident that the provisions of Section 5(d) of the Administrative Procedure Act are not met by the petition here presented. That petition should be rejected because the declaratory orders sought would result in removing no uncertainty nor in terminating any actual controversy. Seatrain in its petition for certiorari filed in the Supreme Court expressly concedes this point. It says at p. 15 of the petition:

> In order to comply with the District Court's suggestion in this case that it again resort to the Commission, petitioner has applied to the Commission for a declaratory order under Section 5(d) of the Administrative Procedure Act, defining the extent and basis of the Commission's jurisdiction in the premises. Petitioner hopes in this way to gain the benefit of a current expression by the Commission of its views as to the two questions here presented to the Court. *But petitioner also recognizes that no decision by the Commission on these questions can finally settle these issues,—that only a decision by this Court can have that effect.* Whatever declara-

> tory order the Commission might make would not be binding on anyone who might choose to challenge it or challenge any action of the Commission taken in pursuance thereof. (Emphasis supplied)

C. *Section 5(d) Was Not Intended to Authorize Orders of the Commission Which Would Determine a Part of the Controversy Only.*

We pointed out above that the language and the legislative history of Section 5(d) show quite clearly that it was intended to authorize declaratory orders only in the case of an actual controversy and where those orders would be dispositive of the case. A related point is worth emphasis. The Courts have determined that under the Declaratory Judgment Act they will not issue a declaratory judgment which disposes of only a piece of the controversy, leaving the remainder to be tried after further hearing or in another forum. The matter is well put by the Court of Appeals for the Fourth Circuit in *Aetna Casualty & Surety Co.* v. *Quarles,* 92 F. 2d 321:

> "* * * Whether the remedy shall be accorded one who petitions for it is a matter resting in the sound discretion of the trial court, to be reasonably exercised in furtherance of the purposes of the statute. It should not be accorded, however, to try a controversy by piecemeal, or to try particular issues without settling the entire controversy, or to interfere with an action which has already been instituted."

This decision has been cited in numerous cases and with approval by the Supreme Court in *Brillhart* v. *Excess Insurance Company,* 316 U. S. 491.

It is evident from the discussion at pp. 25-33 *supra* that the only actual controversies pending could not be disposed of by Commission answers to the questions respecting which Seatrain seeks declaratory orders. The antitrust case will have to be disposed of finally by the appellate courts. The controversy in Docket No. 31014 will have to be disposed of after hearing to the extent of the Commission's jurisdiction, whatever the scope of that jurisdiction may be determined to be. Declaratory orders issued at this time would be subject to judicial review. Final Commission orders in Docket No. 31014 would be subject to like review. Neither the Commission nor the courts could well proceed in these matters as if the two were wholly unrelated. Splitting up this single controversy thus offers prospect of conflict and confusion between Commission and courts which can only compound the delays and the difficulties in securing a final solution.

D. *Section 5(d) of the Administrative Procedure Act Empowers the Commission to Issue Declaratory Orders Only After Opportunity For Hearing.*

Section 5(d) of the Administrative Procedure Act adds only a limited authority to that already possessed by the Commission. That section, in relevant part, provides:

> "Sec. 5. In every case of adjudication *required by statute to be determined after opportunity for agency hearing* . . .
>
> (d) The agency is authorized in its sound discretion, with like effect as in the case of other orders, to issue a declaratory order to terminate a controversy or remove an uncertainty."

Appendix C

The Commission, then, may issue declaratory orders, not with respect to every matter within its jurisdiction, but only concerning those issues required by statute to be decided after opportunity for full hearing.

This section of the Act does not, for example, authorize the Commission to issue rulings interpreting one of its regulations. It does not empower the issuance of a declaratory order, even where a case of adjudication is involved, if the Commission's order can be made without the necessity for hearing. Congress intended that the order issued under this section would be binding upon the parties and would bring genuine disputes to a conclusion. For this reason it was careful to afford the parties the same right to a hearing as was provided for other cases of adjudication. This is fully borne out by the explanation of this section given in the committee reports and by the managers in the course of debate. (See excerpts from House and Senate Report, and the statement of the manager of the Bill on the floor of the House, set out at pp. 25-27, supra). It is, therefore, evident from the express language of the statute, confirmed by the legislative history, that the Commission may issue declaratory orders only with respect to disputes required by statute to be resolved, on the record, after opportunity for hearing. It is equally evident that as the declaratory order is itself intended finally to resolve the dispute that the parties must be afforded a hearing before such orders are made. The Commission's own decisions confirm this view.

Appendix C

The Commission has issued rulings under Section 5(d) of the Administrative Procedure Act in only two cases. In both instances the rulings were made after an opportunity for full hearing. In both instances the issues presented met the requirement of the Act in that they were determinable by the Commission only after hearing, although in one case the Commission took a contrary view.

Atlantic Freight Lines, Inc., 51 MCC 175 was decided before the decision of the Supreme Court in *Riss & Co. Inc.* v. *United States,* 341 U. S. 907. The petitioner had asked for a declaratory ruling under Section 5(d) to interpret and clarify the meaning of its certificate. The Commission noted that the certificate might be issued under Section 206(a) of the Interstate Commerce Act without the opportunity for an agency hearing and therefore held that the petition was improperly filed under Section 5(d) of the Administrative Procedure Act.

In *Arizona Sand & Rock Co.* v. *Southern Pacific Co.,* 280 I. C. C. 285, the Commission was asked under Section 5(d), pursuant to suggestion by a district court, to determine the amount due from the petitioner under certain demurrage tariffs. Suit had been brought in the district court by the railroad for recovery of the charges. The case was decided only after the usual procedure of hearing, examiner's report, exceptions and reply.

The establishment of conditions of car-interchange and the grant of reparation are matters of adjudication which may be determined only after hearing. Interstate Commerce Act Sections 1(14), 8, 13, 15(1); *Atchison T & S Fe R. Co.* v. *United States,* 284 U. S. 248, 262; *I. C. C.* v.

Louisville & Nashville Ry. Co., 227 U. S. 88, 91. To this extent the questions presented by the petition are fit subjects for consideration under Section 5(d) of the Administrative Procedure Act. The declaratory orders, however, may be issued only after hearing is held. Regarding the questions presented here for declaratory orders, there has of course been no opportunity for Commission hearing. Such a hearing will be afforded in Docket No. 31014. After such hearing the time will be ripe, as it is now ripe, for disposal of these issues and the much broader issues posed by the complaint in No. 31014.

E. *The Commission May Determine, After Hearing, That the Questions Posed by the Petition Do Not Require Answers*

We have shown above that Section 5(d) of the Administrative Procedure Act requires opportunity for a hearing before a declaratory order will be made. This case affords a good illustration of the wisdom of this decision on the part of the Congress.

It is entirely possible that a hearing will demonstrate that Seatrain is not hurt by the present application of the car service and per diem rules. If this fact should emerge from the hearing the Commission may well decide to avoid these difficult, abstract and theoretical questions of its jurisdiction and to face these issues only when they are necessarily presented. There is ample precedent for such a procedure.

The courts have long followed the practice of limiting their decisions to the precise facts before them; of finding the narrowest possible grounds for decision. Administrative tribunals exercising judicial functions have as good reason to adopt the same rule. It is deeply set in our tradition of the judicial process that the announcement of principles of broad and general applicability is to be avoided where the necessity is absent. The safe course is to meet each question narrowly as it arises and to permit the general principles to emerge of their own.

This rule has of course found its most pronounced application in the fields of federal jurisdiction and constitutional law.

The classic statements are those of Justice Brandeis in *Ashwander* v. *Tennessee Valley Authority,* 297 U. S. 288, 346 and Justice Rutledge in *Rescue Army* v. *Municipal Court,* 331 U. S. 549, 568-569, Justice Rutledge summarized the matter as follows:

> From *Hayburn's Case,* 2 Dall. 409 to *Alma Motor Co.* v. *Timken-Detroit Axle Co.* and the Hatch Act case decided this term, this Court has followed a policy of strict necessity in disposing of constitutional issues. The earliest exemplifications, too well known for repeating the history here, arose in the Court's refusal to render advisory opinions and in applications of the related jurisdictional policy drawn from the case and controversy limitation. U. S. Const. Art. III. The same policy has been reflected continuously not only in decisions but also in rules of court and in statutes made applicable to jurisdictional matters, including the necessity for reasonable clarity and definiteness, as well as for timeliness, in raising and presenting constitutional questions.
>
> The policy, however, has not been limited to jurisdictional determination. For, in addition, 'the

> Court (has) developed for its own governance in the cases confessedly within its jurisdiction, a series of rules under which it has avoided passing upon a large part of all the constitutional questions pressed upon it for decision.' Thus, as those rules were listed in support of the statement quoted, constitutional issues affecting legislation will not be determined in friendly, nonadversary proceedings; in advance of the necessity of deciding them; in broader terms than are required by the precise facts to which the ruling is to be applied; if the record presents some other ground upon which the case may be disposed of; at the instance of one who fails to show that he is injured by the statute's operation, or who has availed himself of its benefits; or if a construction of the statute is fairly possible by which the question may be avoided.
>
> Some, if not indeed all, of these rules have found "most varied applications." And every application has been an instance of reluctance, indeed of refusal, to undertake the most important and the most delicate of the Court's functions, notwithstanding conceded jurisdiction, until necessity compels it in the performance of constitutional duty.

In similar fashion the Supreme Court will not reach a federal question although properly presented if adequate state grounds for the decision are present. *Herb* v. *Pitcairn*, 324 U. S. 117, 125-126; *Berea College* v. *Kentucky*, 211 U. S. 45, 53. "The same policy [of strict necessity] has been reflected continuously not only in decisions but also in rules of court and in statutes made applicable to jurisdictional matters." Indeed, the Supreme Court has, upon occasion, avoided the necessity of deciding difficult questions of its jurisdiction by going directly to the merits of a controversy.

Appendix C

In Brooks v. *Dewar,* 313 U. S. 354, 360, a motion to dismiss a suit against a subordinate Federal officer on the ground that the Court lacked jurisdiction for several alternative reasons had been denied below. The Supreme Court noted that the questions were difficult and far-reaching, and that the authorities were not in agreement. It refrained from decision of these questions.

> "Since the jurisdiction and the procedure of the court below are sustained by decisions of this Court, we are unwilling to base our judgment upon a resolution of asserted conflict touching issues of so grave consequence, where, as here, the bill fails to make a case upon the merits."

See also *Ex parte Collett,* 337 U. S. 55, 72.

Similarly here, examination of the facts regarding car interchange may well indicate that Seatrain has not been hurt and for that reason alone the time is not yet at hand for a commission decision that its authority extends further than the point reached in earlier proceedings. This, of itself, would be sufficient reason for the Commission to exercise the "sound discretion" called for by Section 5(d) of the Administrative Procedure Act and to refuse to respond to the petition in advance of hearing.

The same considerations are applicable to the question relating to abuse of process regarding which Seatrain seeks a declaratory order. It is impossible to tell from the pleadings before the Commission and those before the courts what is the exact nature of Seatrain's complaints. In large part, at least, it apparently is alleged that these abuses were the means employed to prevent Seatrain from realizing the rights conferred upon it by the Interstate Commerce Act. To this extent the reparation power of the Commission (Sections 8, 9, 13 and 16 of the Interstate Commerce Act) would appear to afford authority for Commission relief. If Seatrain were seeking damages based solely upon allegations of harrassing and unfair litigation, unrelated to any alleged ends of depriving it by such harrassment of rights under the Act, whether by concerted or individual action, then certainly there is no authority in the Commission to order reparation. If Seatrain's first question is to be viewed as a hypothetical one, it might be read as meaning the latter. If it be viewed in the context of what Seatrain alleged in this regard in its antitrust complaint and what the District Court decided, then the alleged abuse of process is firmly entangled with allegations of the deprivation of rights under the Interstate Commerce Act, as one of the means alleged to have been used to effect those deprivations. Until the line between those complaints remediable by the Commission and those which are not has been drawn by a hearing, the residue that may be left to the Courts must remain uncertain.

Moreover, the Commission here too may find that the conduct of the railroads has been justified and proper and consequently have no need to reach any nice measurements of the extent of its jurisdiction. *Brooks* v. *Dewar,* 313 U. S. 354, 360; *Ex parte Collett,* 337 U. S. 55, 72. In such case the separation of those of Seatrain's charges that are necessarily tied to complaints obviously within the Commission's jurisdiction and those which are not, need not be undertaken. Here too, then, the wisdom of scheduling a hearing in advance of decision is apparent. This is emphasized by a brief review of the Seatrain litigation down to this point. Paragraph 5 of the railroads' complaint to the Commission in Docket No. 31014 lists the proceedings before the Commission in which Seatrain has been involved. All but one of these proceedings were commenced in the Commission, and that exception was a water carrier dispute to which the railroads were not parties. All of these Commission proceedings were commenced by Seatrain or by interests affiliated in interest with Seatrain, except for three investigations commenced by the Commission on its own motion. It is obvious that the railroads, which had never instituted a Seatrain proceeding until their comprehensive complaint filed on March 26, 1952, cannot be charged with abuse of process in merely defending the proceedings commenced by others.

F. *The Commission Should Not Answer the Questions Posed by Seatrain Until After Hearing Because the Reach of Its Jurisdiction is Governed by Considerations Which Can Only be Determined Concretely and Not in Abstraction.*

At pp. 16-25, *supra,* we have pointed out that the question of the general extent of the Commission's authority over car service is essentially a question of law which the courts must ultimately decide. We have also pointed out that the Supreme Court in *United States* v. *Pennsylvania R. Co.,* 323 U. S. 612, has considered this question and determined that the Commission has broad powers over car interchange. The question proposed in Seatrain's petition with respect to car service is cast in general abstract terms. If taken at its face value, the petition raises a general question of law which the courts are competent to decide. We believe that question has been decided by the Supreme Court in *Pennsylvania Railroad case*. In any event the question is now before the courts for decision in Seatrain's antitrust suit. On the other hand, if Seatrain's question is to be viewed as an attempt to obtain a declaratory order which will have specific application to the controversy between Seatrain and the railroads, it raises issues that cannot be determined in the abstract or without regard to the facts. Although the Commission has broad authority over the matter of car service, the reach of its powers in a particular situation or controversy depends upon findings with respect to what is needed to insure the movement of interstate commerce without interruption or delay. These findings obviously depend upon facts. The extent of the Commission's jurisdiction can fairly be defined only if full factual data regarding such matters are before the Commission. The Commission cannot safely nor justly determine its jurisdiction on the basis of such abstract questions as Seatrain poses.

The Commission and the Supreme Court are in agreement that jurisdiction to require through-routes implies a power to order car interchange. The Commission, in *Investigation of Seatrain Lines,* 206 I. C. C. 328, 340-343 stated its conclusion in these terms:

> "The duty to maintain through routes carried with it necessarily the power on our part to enforce rules which would permit the free interchange of

> cars between carriers, the theory of this provision of the act being that carriers should freely interchange freight between their respective lines to the end that interstate commerce must move without interruption or delay."

The Court, after repeating much of this language, put the matter in this fashion (323 U. S. 612 at 619):

> "Since a rail water through route with Seatrain cannot function without an interchange of cars, the unquestioned power of the Commission to require establishment of such routes would be wholly fruitless without the correlative power to abrogate the Association's rule which prohibits the interchange."

The question then is a factual one: what is necessary by way of car interchange to insure that commerce moves without interruption or delay or, if the Court's phrasing be employed: what Commission orders will eliminate the possibility that "Seatrain cannot function"?

This inquiry must obviously proceed in the light of the functioning of the national freight car pool. If its functioning results in frustrating the efficient operations of through routes established by the Commission, then there is substantial basis to argue from the Supreme Court's decision that the Commission might abrogate or order modification of Car Service Rule 4 to the extent necessary to permit those routes to operate without interruption or delay. But this does not mean that the ordinary rights of ownership are completely abrogated. It does not mean that a railroad must make its property freely available to Seatrain on demand whatever be the nature of that demand. It means only that ordinary property rights must give way to superior rights after it is shown that the property rights require modification to insure that interstate commerce move without interruption or delay. It is unnecessary at this point to reach final conclusions in these matters. We do feel that this sufficiently demonstrates that the exact scope of the Commission's jurisdiction to order car-interchange with Seatrain must depend for proper determination upon detailed inquiry as to Seatrain's need, the car supply now available to it, the degree to which Car Service Rule 4 interferes with its operations, etc. These matters can be developed only through a full hearing.

Again in the ***Pennsylvania*** case the Supreme Court found that the Commission's authority to order interchange with Seatrain is not dependent solely upon its authority over through routes. It rests instead upon a combination of sections including Section 3(4) as well as the declaration of policy. Secton 3(4) affirmatively requires all railroads to "afford all reasonable, proper and equal facilities for the interchange of traffic between their . . . lines and connecting lines . . ." The Supreme Court was obviously of the opinion that the Commission could require Seatrain's connections to afford it the same treatment with respect to the interchange of cars as they afford other connecting lines. In view of the fact, also, that the Court was sustaining the Commission's authority to direct railroads which were not Seatrain connections to make available their cars for interchange with Seatrain, the Court appears to be of the opinion that the Commission's power to require equal treatment would enable it to go beyond the connecting line to other carriers, if it could be shown that the inability of a connecting line to afford Seatrain the equal facilities required by the Act was the result of action taken by these other carriers. This again might furnish authority for the Commission abrogating or modifying Car Service Rule 4. It would afford such authority, however, only if it could be shown that the operations of the national freight car pool frustrated Seatrain's connections in affording Seatrain all reasonable and proper facilities for the interchange of traffic. That determination can be made only upon the basis of a full examination of Seatrain's operations and the operations of the national freight car pool. Here again a fair answer to the question of the exact dimensions of the Commission's jurisdiction can be made only after full hearing and not in response to abstract questions.

III. Conclusion

It is suggested in conclusion that (a) as a matter of comity the Commission will not go forward to answer these questions posed by Seatrain unless invited by the Courts or until the Courts have concluded their consideration of these matters. (b) The essential conditions to adjudication under Section 5(d) of the Administrative Procedure Act have not been met here. There is no controversy ripe for decision which the declaratory orders will terminate. They would result in deciding a controversy piecemeal. There has been no opportunity for hearing which would permit the adjudication to be made "on the record after opportunity for an agency hearing." (c) After hearing, these difficult questions regarding the Commission's jurisdiction may prove moot. In these circumstances we suggest that the appropriate disposition of this matter is to dismiss the petition.

Respectfully submitted,

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Dated: January 30, 1953.

Certificate of Service

I hereby certify that I have this day served the foregoing brief upon the petitioner, Seatrain Lines, Inc., by mailing a copy thereof by first class mail to its attorney, S. S. Eisen, 140 Cedar Street, New York, N. Y., and upon the Association of American Railroads by mailing a copy by first class mail to Thomas L. Preston, its General Solicitor, Transportation Building, Washington, D. C.

. . . .
Lawrence J. Latto

APPENDIX D

BEFORE THE

Interstate Commerce Commission

DOCKET No. 31177

IN THE MATTER OF THE PETITION OF SEATRAIN LINES, INC., FOR THE ISSUANCE OF DECLARATORY ORDERS UNDER SECTION 5(d) OF THE ADMINISTRATIVE PROCEDURE ACT

BRIEF ON BEHALF OF THE ASSOCIATION OF AMERICAN RAILROADS

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Due Date: January 30, 1953.

Notices and other communications concerning this proceeding may be addressed to

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Appendix D

BEFORE THE

INTERSTATE COMMERCE COMMISSION

Docket No. 31177

In the Matter of the Petition of Seatrain Lines, Inc., For the Issuance of Declaratory Orders Under Section 5(d) of The Administrative Procedure Act

BRIEF ON BEHALF OF THE ASSOCIATION OF AMERICAN RAILROADS

I. Introductory

In its petition herein (pp. 1, 15-16, 82) Seatrain invokes the authority of the Commission to issue declaratory orders under Section 5(d) of the Administrative Procedure Act, in order, as Seatrain asserts, "to remove uncertainties which have arisen as a result of a recent decision of the United States District Court for the District of New Jersey" and to "terminate controversy."

The recent decision of the United States District Court referred to is that rendered by Chief Judge Forman on October 23, 1952, in *Seatrain Lines, Inc.* v. *Pennsylvania*

Railroad Company, et al., now on appeal to the United States Court of Appeals for the Third Circuit, and also the subject of pending petition by Seatrain to the Supreme Court of the United States for a writ of certiorari before rendition of judgment in the Court of Appeals.

The opinion of the District Court is reported in 108 F. Supp. 113 and it is printed as Exhibit A to Seatrain's petition herein (Ptn., Vol. 2, pp. 1-34). Page references in this brief to the opinion of the District Court will be to Seatrain's Exhibit A.

Seatrain's petition to the Supreme Court, wherein it seeks to by-pass the Court of Appeals and obtain immediate review by the Supreme Court of the decision of the District Court, is dated contemporaneously with its petition to the Commission in this proceeding (December 10, 1952), and a copy of the petition here is exhibited to the Supreme Court as Appendix B to the petition for certiorari. A copy of the latter petition is annexed to the petition here as Exhibit C.

We take it that in these circumstances the Commission will take official cognizance of the pending petition in the Supreme Court, and will consider representations by Seatrain to the Supreme Court respecting its petition here as pertinent to the exercise by the Commission of a sound discretion in disposing of this proceeding.

II. The Scope of This Brief

It may well be that any declaratory order issued by the Commission in this proceeding would be wanting in legal sufficiency because not dispositive of an actual controversy and as otherwise beyond the purview of Section 5(d) of the Administrative Procedure Act. No waiver of right to challenge the validity of such an order is to be inferred from the limited scope of this brief, which is confined to considerations bearing upon the exercise by the Commission of a sound discretion in the premises, apart from any question of the legal sufficiency of any declaratory order or orders which might be issued herein. Under Section 5(d) of the Administrative Procedure Act the Commission is "authorized"—in no case is it required—to issue declaratory orders; and this authority is to be exercised by the Commission "in its sound discretion." This brief is addressed to the proposition that, as a matter of sound discretion, the Commission should decline to issue the requested orders, and should dismiss the petition.

III. The Petition in Substance and Effect Invites the Commission to Review the Decision of the District Court

The petition (pp. 82-3) seeks declaratory orders responsive to the following queries:

> "1. Has the Interstate Commerce Commission the requisite authority, and if so under what specific provisions of the Interstate Commerce Act, to award reparation for damages resulting from the utilization of available administrative and court procedures, in bad faith or without probable cause, knowingly or recklessly misrepresenting facts therein and making misleading statements of facts therein, multiplying and protracting proceedings thereunder, in bad faith or without probable cause, not for the purpose of obtaining settlement of issues but with the intended effect of continuing and creating doubts and uncertainties, all for the purpose of preventing future diversion of all-rail traffic to Seatrain?"

> "II. Has the Interstate Commerce Commission the requisite authority, and if so under what specific provisions of the Interstate Commerce Act, to require railroads which do not participate in and maintain through routes with Seatrain to permit interchange of their freight cars with Seatrain and permit the use of such freight cars in connection with transportation via Seatrain in interstate commerce?"

These questions were involved in the case before the District Court, where the suit was dismissed upon the ground of primary jurisdiction of the Commission. That was an antitrust suit to enjoin an alleged conspiracy by sundry railroads and railroad organizations to boycott Seatrain, and for recovery of treble damages against certain of the railroad defendants It is unnecessary here to elaborate upon the character of the suit and the issues presented and decided. The opinion of the District Court, Exhibit A to the petition, sets them out with clarity. Suffice it here to say, as the District Court expressly held, that the "heart of the controversy" revolved around "the question of whether Seatrain shall have access to the freight cars of the railroads," and that "subsidiary charges made by Seatrain as to unfair competitive practices"—which included the allegations of abuse of Commission and court processes for purposes of vexation—were "incidental to the main allegations of the complaint that the defendants have conspired to deny to Seatrain interchange and use of freight cars owned by railroads" (Ptn., Vol. 2, p. 30).

As already stated, the case was dismissed on the ground of primary jurisdiction in this Commission. As to the major issue of car interchange the Court held that "not only has the Interstate Commerce Commission jurisdiction to grant it (Seatrain) relief from its alleged complaints but that relief cannot be afforded except as the Commission finds that it is justified and if so under what terms and conditions it is to be regulated and administered'' (*id,* p. 29). As to the subsidiary charges of unfair competitive practices incidental to the principal charge concerning car interchange the Court held, upon familiar principles (*United States Navigation Co.* v. *Cunard S. S. Co.,* 284 U. S. 474, 480-85; *Terminal Warehouse Co.* v. *Pennsylvania Railroad Co.,* 297 U. S. 500, 513), that they "must follow the major charge as being within the jurisdiction of the Commission'' (*id.,* p. 30).

The Court did not stop with holding in general terms that the Commission has primary jurisdiction with respect to car interchange. In reliance upon *United States* v. *Pennsylvania R. Co.,* 323 U. S. 612 (1945), it spelled out the sources of that jurisdiction in enumerated sections of the Interstate Commerce Act, pointing specifically to Sections 1(4), 1(10), 1(13), 1(14) (a), 3(4), 7, 15(3) and 305(b). (*id.,* pp. 24-5). Advertising to the interpretation of the Act by the Supreme Court in the *Pennsylvania* case, the District Court said (*id.,* p. 26):

> "In the spirit of this interpretation of the national transportation policy it appears that the Interstate Commerce Commission has the jurisdiction and the power to direct such conditions of interchange that will integrate Seatrain into the national transportation system as envisaged by the National Transportation Act of 1940 to the maximum use of its service and facilities subject, of course, to the standard of public necessity and convenience. It may determine and direct through routes with Seatrain as it, indeed, had done heretofore and if in the proper development of those

> through routes interchange of and access to cars, even though not owned by railroads participating in such through routes are required, it may make appropriate directions. To this end if the suspension of Car Service Rule 4 of the Association is required, the Commission must have the power to do so.
>
> "Obviously the many considerations that enter into the task of determining the character of such interchange are not for the courts, but for the expert judgment of the Interstate Commerce Commission."

It is thus shown that the District Court, with a directness admitting of no uncertainty, has answered affirmatively the question, "Has the Interstate Commerce Commission the requisite authority, and if so under what specific provisions of the Interstate Commerce Act, to require railroads which do not participate in and maintain through routes with Seatrain to permit interchange of their freight cars with Seatrain and permit the use of such freight cars in connection with transportation via Seatrain in interstate commerce?"

As to the question pertaining to the authority of the Commission to award reparation for damages resulting from abuse of administrative and court procedures indulged in "for the purpose of preventing future diversions of all rail traffic to Seatrain," we take it the Commission will not contemplate the query except in relation to the antitrust case, which, according to Seatrain, is the source of the uncertainties it seeks to have resolved (Ptn., p. 1). Except in relation to that suit, the question is a purely hypothetical one, to be answered, if at all, *in vacuo*. As it relates to the antitrust suit, the question was disposed of by the holding of the District Court that this facet of the alleged conspiracy "must follow the major charge as being within the jurisdiction of the Commission."

It is thus evident that the questions posed by Seatrain for answer by declaratory orders of the Commission were disposed of by the District Court in the antitrust case, subject only to review in the higher courts upon pending appeal. The District Court did not feel constrained to stay the case before it and elicit the advice of the Commission. cf. *Arizona Sand & Rock Co.* v. *Southern Pacific Co.*, 280 I. C. C. 285; *Express Contract, 1929*, 275 I. C. C. 739. On the contrary, the District Court determined the jurisdictional question for itself and dismissed the case, in deference to the primary and exclusive jurisdiction of the Commission.

We respectfully suggest that Seatrain's petition for declaratory orders amounts to no more than an invitation to the Commission to review the decision of the District Court. We are unable to perceive in what respect declaratory orders responsive to the petition would remove any uncertainty or what controversy would be terminated by the issuance of such orders. Rather, as it appears to us, Seatrain invites the Commission to concur in the decision of the District Court, on the one hand, or to dissent therefrom, on the other. To what end, except to place the Commission in an untenable and even an unseemly position, escapes us. It is no part of the Commission's function to reveiw the decision of the District Court, and sound discretion would clearly call for declination of the invitation to do so.

IV. The Petition Asks the Commission to Anticipate the Decision of the Antitrust Case Upon Appeal

Seatrain noticed appeal from the decision of the District Court to the Court of Appeals for the Third Circuit November 21, 1952, and on November 25, 1952, the appeal was duly docketed. On December 11, 1952, Seatrain filed in the Supreme Court its petition dated December 10, 1952, for certiorari before rendition of judgment in the Court of Appeals. Thus the very questions presented to the Commission by Seatrain's petition here for answer by declaratory orders are pending before the Court of Appeals and are sought to be brought before the Supreme Court without awaiting judgment in the Court of Appeals. Neither the Court of Appeals nor the Supreme Court has called upon the Commission for its appraisal of the decision of the District Court. Only Seatrain has done that. We respectfully suggest that sound discretion dictates that the Commission refrain from vouchsafing legal opinions upon questions pending before the appellate federal courts, in the absence of any invitation by those tribunals that it do so.

V. Seatrain's Representations in the Supreme Court Respecting Its Petition Here Show That the Requested Declaratory Orders Should Be Withheld

In its petition to the Supreme Court for a writ of certiorari before rendition of judgment in the Court of Appeals, Seatrain represents that the declaratory orders which it requests the Commission to enter would settle nothing and bind no one. In other words, according to its petition in the Supreme Court, Seatrain asks the Commission to make a gesture of futility. The pertinent portion of Seatrain's petition for certiorari reads (Ptn., Vol. 2, Ex. C, p. 55):

> "In order to comply with the District Court's suggestion in this case that it again resort to the Commission, petitioner has applied to the Commission for a declaratory order under Section 5(d) of the Administrative Procedure Act, defining the extent and basis of the Commission's jurisdiction in the premises.[2] Petitioner hopes in this way to gain the benefit of a current expression by the Commission of its views as to the two questions here presented to the Court. But petitioner also recognizes that no decision by the Commission on these questions can finally settle these issues,—that only a decision by this Court can have that effect. Whatever declaratory order the Commission might make would not be binding on anyone who might choose to challenge it or challenge any action of the Commission taken in pursuance thereof."

"[2] A copy of this application as filed with the Commission is annexed hereto as Appendix B."

The statement that Seatrain filed its petition for declaratory orders by this Commission "in order to comply with the District Court's suggestion that it again resort to the Commission" is beyond our comprehension. The District Court held that the Commission had primary and exclusive jurisdiction over the matters complained of in the antitrust suit, and it remitted Seatrain to such remedy as it might obtain in appropriate proceedings before this tribunal. There is certainly nothing in the decision of the District Court to suggest that Seatrain should seek declaratory orders embodying a current expression by the Commission on abstract questions of law which, as Seatrain itself tells the Supreme Court, would settle no issue and be binding upon no one.

According to Seatrain's own representation to the Supreme Court in its petition there, the requested declaratory orders, if issued, would not serve any office of adjudication. They would terminate no controversy, bind no one. They would, then, amount to no more than advisory opinions. Orders of that character are clearly not authorized by Section 5(d) of the Administrative Procedure Act. But aside from any question of authority, it seems plain that the Commission should refrain, as a matter of discretion, from descending to the office of legal adviser to a party to litigation pending in the federal courts. That, as it appears to us, is precisely what Seatrain's petition for declaratory orders in effect invites the Commission to do.

VI. CONCLUSION

It is respectfully suggested that, for the reasons stated herein, the Commission, as a matter of sound discretion, should dismiss the petition.

Respectfully submitted,

J. Carter Fort
Thomas L. Preston
Gerald D. Finney
Counsel for the Association of American Railroads

Appendix D

Certificate of Service

I hereby certify that I have served the foregoing document in accordance with the order of the Commission herein dated December 24, 1952, by mailing by first-class mail copy thereof addressed to Mr. S. S. Eisen, 140 Cedar Street, New York 6, N. Y.; Mr. Hugh B. Cox and Mr. Francis M. Shea, 1106 Walker Building, Washington 5, D. C.

Dated at Washington, D. C., this 30th day of January, 1953.

Thomas L. Preston
Counsel for the Association of American Railroads

Due Date: January 30, 1953.
Washington, D. C.
January 30, 1953.

APPENDIX E

BEFORE THE

Interstate Commerce Commission

Docket No. 31177

SEATRAIN LINES, INC. PETITION FOR DECLARATORY ORDERS

REPLY BRIEF OF SEATRAIN LINES. INC.

Seatrain Lines, Inc.,
15 Broad Street,
New York 5, New York,

By: S. S. Eisen,
140 Cedar Street,
New York 6, New York,
Its Attorney.

March 6, 1953

Appendix E

BEFORE THE

INTERSTATE COMMERCE COMMISSION

Docket No. 31177

SEATRAIN LINES, INC. PETITION FOR DECLARATORY ORDERS

REPLY BRIEF OF SEATRAIN LINES, INC.

Opening Statement

By its order dated December 24, 1952, in Docket No. 31177, the Commission authorized the filing on or before January 30, 1953, of briefs in support of or in opposition to the relief sought by the petition of Seatrain Lines, Inc., for the issuance of declaratory orders, and the filing of replies thereto on or before February 20, 1953. The latter date was subsequently extended to March 6, 1953.

On January 30, 1953, a brief was filed on behalf of seven railroads and their subsidiaries, which are also the defendants in *Seatrain Lines, Inc.* v. *Pennsylvania Railroad Company, et al.*, Civil Action 1188/51, in the United States District Court for the District of New Jersey. Said railroads are hereinafter referred to as railroad defendants. On the same date, a separate brief was filed on behalf of the Association of American Railroads, the remaining defendant in the last-cited proceeding, hereinafter referred to as the Association.

The reply of Seatrain Lines, Inc. is directed almost exclusively to exposing misstatements and misrepresentations contained in the briefs filed herein, to which this reply is directed, and in the joint brief filed by the railroad defendants and the Association with the United States Supreme Court. The last mentioned brief, filed almost coincidentally with the briefs herein, requests the Supreme Court to deny the writ of certiorari sought because, it is argued, the same issues as are contained therein are before this Commission. At the same time, the briefs filed herein, to which this reply is directed, urge the Commission to refuse to issue the declaratory orders sought because of the contention that the same issues involved therein are before the Supreme Court. The position of the railroad defendants and the Association, therefore, is that relief in all tribunals should be denied and the entire situation herein should remain unchanged in a complete vacuum.

Proper analysis of the misstatements and misrepresentations, as this reply brief endeavors to accomplish, should arrange the true and basic facts in their proper perspective and result in the inevitable concluion that the declaratory orders herein sought should be issued.

I. The Briefs, and the Prayers for Dismissal of the Petition for Declaratory Orders Contained Therein, Are Predicated Upon the Theory That the Issue as to Damages Raised Herein is Identical with That Involved in the Anti-Trust Case. That Theory, Being Contrary to Fact, Is Wholly Erroneous.

The principal argument advanced by the railroad defendants and the Association, in requesting the Commission not to issue the declaratory orders sought, is that the issues raised in the petition for the declaratory orders are the identical issues that constitute both the basis of Seatrain's appeal from the decision of the United States District Court for the District of New Jersey, in Civil Action 1188/51, and its petition for a writ of certiorari, in connection therewith, to the United States Supreme Court.

The brief of the railroad defendants states:

> "In summary, then, there is now pending before the Third Circuit on appeal, and before the Supreme Court on petition for certiorari, proceedings which seek in those courts adjudication of the same issues presented here." (p. 9)
>
> "The issues raised by these two petitions are identical." (p. 11)
>
> "That these questions are concurrently presented to two tribunals is, of course, occasioned solely by Seatrain's deliberate choice." (p. 13)
>
> "It can only be a matter of embarrassment to the Commission to attempt, at this point, to deal with these precise questions which are pending before the courts." (p. 25)

In the brief of the Association it is stated:

> "We respectfully suggest that Seatrain's petition for declaratory orders amounts to no more than an invitation to the Commission to review the decision of the District Court." (p. 7)
>
> "It is no part of the Commission's function to review the decision of the District Court, and sound discretion would clearly call for declination of the invitation to do so." (p. 7)
>
> "Thus the very questions presented to the Commission by Seatrain's petition here for answer by declaratory orders are pending before the Court of Appeals and are sought to be brought before the Supreme Court without awaiting judgment in the Court of Appeals." (p. 8)

> "In other words, according to its petition in the Supreme Court, Seatrain asks the Commission to make a gesture of futility." (p. 8)

Other than the basic argument advanced that the issues involved herein are identical with those in the court proceedings, the briefs of the railroad defendants and the Association are concerned wholly with procedural matters dealing with Section 5(d) of the Administrative Procedure Act. Even these procedural matters however, are interrelated with, are subordinate to, and actually flow from the principal contention that the issues raised in the petition herein are identical with the issues before the Appellate Federal Court in the anti-trust proceeding.

(A) The Question Before the Commission As to Its Jurisdiction to Award Damages Is Not the Same as the Issue Before the Federal Courts.

In its petition for the issuance of declaratory orders, Seatrain stressed the fact that the principal matter in the anti-trust proceeding, in so far as it was concerned, was the obtainment of injunctive relief, and the recovery of damages suffered from the concerted abuse of judicial and quasi-judicial procedures, in bad faith and without probable cause, for the purpose of injuring Seatrain.

The petition for the issuance of declaratory orders unmistakably indicated that the damages sought from the Federal Court, in the anti-trust proceeding, were those incurred prior to November 30, 1951, the date of the commencement of the New York-Savannah service under temporary authority issued by the Commission in *Seatrain Lines, Inc., Temporary Authority Application,* Docket No. W-543 (Sub-No. 2), mimeographed, decided November 13, 1951. The petition further emphasized 'that the damages sought where not those suffered from violations of the Interstate Commerce Act but from actions not prohibited by or declared to be unlawful in said Act, such as the abuse of processes.

The petition for the issuance of declaratory orders, for purposes of illustration, contained examples of actions taken by the railroad defendants and the Association since November 30, 1951, which had caused Seatrain substantial damage. Several of these examples, in fact, were dealt with at considerable length in the anti-trust proceeding, for the purpose of illustrating the continuing nature of the conspiracy there alleged. These examples included the actions of the railroad defendants in the Federal Court at Alexandria, Virginia, in December, 1951, in connection with their petition to set aside the Commission's order granting Seatrain temporary authority to operate between New York and Savannah. *Alabama Great Southern R. Co.* v. *United States,* 103 F. Supp. 223.

Also cited to the Federal Court were the facts relating to the filing on March 26, 1952, by the railroad defendants, with the Commission, of the complaint in Docket No. 31014, and the representations, with respect to its purposes and scope, made to the United States District Court for the District of New Jersey.

The Commission's attention was called, in the petition for declaratory orders, to the actions of the railroad defendants in offering Exhibit 68, on May 9, 1952, in the manner and for the purpose stated by their counsel in *Seatrain Lines, Inc., Extension-Savannah,* Docket No. W-543 (Sub-No. 3).

These and other actions of the railroad defendants and the Association have caused Seatrain substantial damage, for which it is entitled to recover. Seatrain, by its petition for the issuance of declaratory orders, is seeking to determine whether the Commission has jurisdiction to award reparation for damages incurred by reason of such actions. The issue dealing with the Commission's authority to award reparation for damages resulting from abuse of processes, as raised in the petition for the issuance of declaratory orders, is not limited to damages up to November 30, 1951, but, as a practical matter, pertains to damages suffered subsequent to that date, because the statute of limitations limits the Commission's authority to award reparation to a two-year period, as the defendants in the anti-trust proceeding informed the Federal Court.

As the damages sought from the Federal Court in the anti-trust proceeding were incurred prior to November 30, 1951, there is no pending issue before the Federal Court with respect to damages suffered by reason of actions of the defendants, such as those above cited, since November 30, 1951. It is in connection with damages suffered since November 30, 1951, and prior thereto in connection with only such damages as are permitted by the statute of limitations, that Seatrain is seeking the declaratory orders herein with respect to the Commission's jurisdiction. That order is sought so that Seatrain may proceed before the proper tribunal to recover damages suffered since November 30, 1951, as well as those suffered prior to that date which are not barred by the statute of limitations.

It thus is apparent, regardless of the interpretation to be placed upon the District Court's decision with respect to the question of damages, that the Court did not and could not have passed upon any question dealing with damages suffered by Seatrain since November 30, 1951. Therefore there is not now pending, in any other proceeding, any issue concerned with the Commission's authority to award reparation for damages suffered since November 30, 1951, as a result of abuse of processes such as depicted in the examples referred to above, all of which occurred since November 30, 1951. Accordingly, the principal contention of the railroad defendants and the Association, that the Commission should not pass upon this issue because it is before the Federal Courts, is wholly erroneous.

Furthermore, as was shown in the petition for declaratory orders, pages 6 to 10, the damages for which Seatrain is suing in the Federal Courts are based upon concerted actions and conspiracies of the defendants therein, in violation of the anti-trust statutes. The damage question is presented to the Federal Appellate Courts in that context, on review of the District Court's dismissal of that complaint. Clearly, damages that this Commission may award are entirely unrelated to the anti-trust statutes. Accordingly, the legal issues before the Federal Courts and this Commission are different and distinct and, of necessity, are wholly dissimilar, even in principle.

II. The Railroad Defendants and the Association Misconceive and Misstate (A) the Issues Involved in the Anti-Trust Proceeding As Well As (B) the Underlying Objective of the Petition for the Issuance of Declaratory Orders.

(A) The Railroad Defendants and the Association Misconceive and Misstate the Issues Involved in the Anti-Trust Proceeding.

The argument used by the railroad defendants and the Association in requesting the Commission to refuse to issue the declaratory order sought with respect to damages, namely, that such issue is before the Federal Courts, is based upon an alleged interpretation of the Federal Court's decision with respect to the matter of damages, which interpretation, in turn, is predicated upon a complete misconception and misstatement of the issues raised in and by the anti-trust proceeding.

On pages 14 and 15 of the brief of railroad defendants herein, after misstating the issues in the anti-trust proceeding, the following statements appear:

> "It [Seatrain] asked that the Court decide issues under the Interstate Commerce Act which had never

> been submitted to the Commission but which lie within its jurisdiction. Prior to argument and decision of motions to dismiss it modified its prayers for relief *somewhat*[1] but persisted in its decision to seek relief from the courts rather than from the Commission." (Italics supplied.)
>
> "It now seeks to enlist the support of the Commission in this attempt to invest the courts with regulatory authority over this important segment of our transportation system."

A similar misstatement is made to the Supreme Court in the joint brief filed by the railroad defendants and the Association in opposition to Seatrain's application for review filed with that Court, February 6, 1953, (attached hereto as Exhibit A). On pages 4 and 5 of that brief it is stated:

> "Seatrain, by its complaint below, sought to remove the whole controversy—a complex series of technical issues in transportation economics and commerce law—from the Interstate Commerce Commission to the district court and to have it dealt with under the antitrust laws rather than the Interstate Commerce Act."

The fact, of course, as the complaint shows, is that Seatrain did not ask the District Court to decide any issue under the Interstate Commerce Act. It asked only for damages and injunction under the anti-trust laws.

By their statements, the railroad defendants and the Association appear deliberately to be attempting to confuse the issue of damages with the issue of injunction as it was originally sought from the District Court against actions *done pursuant to the anti-trust conspiracy,* relating to subject matters within the regulatory jurisdiction of the Commission. But this latter issue was completely removed from the case before argument took place in the District Court, as railroad defendants and the Association acknowledge. The record before the Commission shows that this is precisely what took place:

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[1] See pages 11 and 12 herein.

In their brief dated April 1, 1952, filed with the District Court in support of their motion to dismiss Seatrain's complaint (see pp. 32 and 33 thereof) they made the same argument, concluding as follows:

> "Rarely, if ever, has a plaintiff made so bold a demand that a federal court by its writ of injunction arrogate to itself the regulatory functions committed by the Congress to the Interstate Commerce Commission."

Seatrain focused attention upon these misstatements of the issues involved in its memorandum of April 14, 1952, filed in opposition to the aforesaid motion to dismiss (pp. 2 and 3) in which it was stated:

> "That, of course, is not at all what plaintiff asks in its complaint, and Seatrain would be prompt to take exception to a court's exercising any of the functions of the Commission."

In the last mentioned document, Seatrain withdrew some of the prayers for relief that were contained in the original complaint, hoping thereby to avoid any confusion as to the issues actually involved, for even then it appeared that the misstatements of the defendants might precipitate such confusion. Sought in the prayers so withdrawn was injunctive relief from the concerted actions of the defendants in violating various provisions of the Interstate Commerce Act and orders of the Commission for the purpose of forcing Seatrain into further litigation before the Commission and the courts, and by reason thereof to cause such uncertainty as to prevent, hinder and retard Seatrain's growth and expansion, with concomitant limitation of its earning powers.

The Commission is fully aware of these activities of the railroad defendants, for it is now confronted with the necessity of having to deal with the promulgation by the railroad defendants of unlawful embargoes, the publication of unlawful tariff clauses stating that no through routes exist (I. & S. Docket No. 5979, *Routing Restrictions Over Seatrain Lines, Inc.*), the failure and refusal of certain defendants to abide by and with the orders issued in *Borough of Edgewater, N. J.* v. *Arcade & A. R. Corp.*, 280 I. C. C. 121, and with the various sections of the Commission's order, as amended, in *Seatrain Lines, Inc.* v. *Akron, C. & Y. Ry. Co.*, 226 I. C. C. 7 and 243 I. C. C. 199.

In initially seeking injunctive relief from such conspiracy to violate the law and the Commission's orders, Seatrain did not, as the railroad defendants and the Association allege, request the Federal Court to assume jurisdiction and regulatory authority over any matter over which the Commission has jurisdiction. For the reasons stated to the Federal Court, and to preclude any confusion as to the relief sought, Seatrain withdrew the prayers for injunctive relief, as aforesaid, and thereupon there remained in issue, in the anti-trust proceeding, only the two matters described in the petition for the issuance of declaratory orders, namely, the issue pertaining to damages suffered primarily from abuse of processes and the issue dealing with the use of cars belonging to railroads which do not participate in or maintain through routes with Seatrain.

In addition to these various improper statements, the Commission's attention is directed to similar misstatements made by the railroad defendants in their complaint in Docket No. 31014, dated March 26, 1952. This complaint was filed prior to Seatrain's withdrawal of the above-mentioned prayers for relief and prior to the statement made by Seatrain (in its memorandum of April 14, 1952, filed with the District Court, as aforesaid) pointing out the misconceptions or errors of the defendants with respect to the issues before the Federal Court. Nevertheless, in the almost eleven months which have transpired since Seatrain amended its complaint by withdrawing those prayers, the complaint in Docket No. 31014 has not been amended to reflect the withdrawal of those prayers for relief. Despite the withdrawal of those prayers, which accordingly limited the issues solely to the question of damages and exclusion from car use, as aforesaid, the railroad defendants currently continue to make the above-quoted misrepresentations both to the Interstate Commerce Commission and to the Supreme Court. Apparently they continue to misstate the case in order to provide support, which otherwise would be totally lacking, for their misrepresentation of the District Court's decision, as shown under the next two sub-headings.

1. *Contrary and Conflicting Arguments Advanced By the Railroad Defendants and the Association Concerning the Jurisdiction of the Federal Court Over the Damages Sought.*

It is upon the misconceptions and misstatements above mentioned that the railroad defendants and the Association now predicate their interpretation of the District Court's decision as to the question of damages which they have advanced to the Commission and to the Supreme Court. At page 8 of the brief of the railroad defendants herein, there appears the following statement:

> "On October 24, 1952, Judge Forman filed a careful opinion holding that the matters complained of were within the primary jurisdiction of the Interstate Commerce Commission or were subsidiary matters incidental to the principal allegations of the complaint and so insufficient to confer jurisdiction upon the court."

Appendix E

In the brief of the Association herein, beginning at page 6, after urging that the Commission refuse to issue the declaratory order sought with respect to damages, there appears the following statement:

> "As it relates to the anti-trust suit, the question was disposed of by the holding of the District Court that this facet of the alleged conspiracy 'must follow the major charge as being *within the jurisdiction of the Commission.'* " (Emphasis supplied)

Further, on page 9 of the same document, the following statement appears:

> "The District Court held that the Commission had *primary and exclusive jurisdiction* over the matters complained of in the antitrust suit, and it remitted Seatrain to such remedy as it might obtain in appropriate proceedings before this tribunal." (Emphasis supplied)

From these quotations it will be seen that the railroad defendants interpret the District Court's decision as holding that the matter of damages is so incidental and insufficient as to confer no jurisdiction upon the Court. The statement of the Association, quoted above, which contains a quotation from the District Court's decision, indicates on the contrary, that the Court settled the matter by holding that the issue with respect to the use of cars is "within the jurisdiction of the Commission" and "that the Commission had primary and exclusive jurisdiction."

As the railroad defendants and the Association thus place different interpretations upon the decision of the District Court, attention is called to the statements of the railroad defendants and the Association in their joint brief, Exhibit A hereof, filed with the Supreme Court. The statements dealing with this matter, which are contained on pages 8 and 9 of said brief, do not conform with either of the last above quoted statements addressed to the Commission.

The Commission's attention is further directed to the statements of the defendants contained in their brief dated April 1, 1952, filed in the anti-trust proceeding, in support of their motion to dismiss the complaint therein (pages 32 and 33), wherein the defendants assert that the Commission has jurisdiction over abuse of processes before it and thus may award damages in connection therewith, but that the Commission does not have any jurisdiction with respect to abuse of processes before the Federal Courts and therefore has no authority to award reparation for damages in connection therewith.

In view of these contradictory and conflicting statements made by the defendants to the Federal Courts and the Commission, as to the matter of the Commission's authority to award reparation for damages suffered from abuse of processes before it or before the Federal Courts, Seatrain respectfully submits that it is entitled to the issuance of the declaratory order sought from the Commission.

2. *The Railroad Defendants and the Association Erroneously Interpret the Findings of the District Court Regarding the Jurisdiction of the Commission Over Unfair Competitive Practices and the Commission's Power to Award Reparation In Connection Therewith.*

The railroad defendants, in their brief herein as well as in their joint brief with the Association filed with the Supreme Court, misstate the opinion of the District Court. At page 9 of Exhibit A, the following statements appear:

> "We urged, and the court held (R. 618) that these were incidental or subsidiary complaints, in-

> sufficient in themselves to warrant a retention of jurisdiction.[10] This holding is correct."

In footnote 10, the following appears:

> "What the district court in fact held was that the charges of unfair competition were so clearly dependent upon the main allegations relating to car interchange, etc., that it would not carve up the complaint to separate these minor and incidental allegations in order to create an independent cause of action; these, therefore, followed the major charges."

The District Court decision held, first, that the Commission had jurisdiction over the unlawful competitive trade practices, including abuse of processes before it and the Federal Courts, and, second, that the Commission had the power to award reparation in connection therewith, as shown in the following quotation from the decision of the Court:

> "The subsidiary charges made by Seatrain as to unfair competitive practices upon the part of the defendants are incidental to the main allegations of the complaint that the defendants have conspired to deny to Seatrain interchange and use of freight cars owned by railroads. They must follow the major charge as being *within the jurisdiction of the Commission.*
>
> "Neither can this court maintain jurisdiction over the suit in so far as it claims treble damages from the primary defendants under the holding herein that the complaint charges acts cognizable under the primary jurisdiction of the Commission which are *remediable under its reparation power. Keogh*

> v. *Chicago & N. W. Ry.*, 260 U. S. 156 (1922); *Terminal Warehouse Co.* v. *Pennsylvania R. Co.*, 297 U. S. 500 (1936); *Georgia* v. *Pennsylvania R. Co.*, 324 U. S. 439 (1945)." (P. 30 of Volume 2 of petition of December 10, 1952, for declaratory orders.) (Emphasis supplied)

Seatrain can find no authority vested in the Commission enabling it to assume jurisdiction over alleged abuse of processes before it or the Federal Courts. Neither can Seatrain find authority vested in the Commission to award reparation for damages suffered by reason of the abuse of processes before it or the Federal Courts. For these reasons, Seatrain filed its petition seeking, from the Commission, the issuance of a declaratory order resolving that ssue insofar as the Commission is concerned; and, coupled therewith, Seatrain asked the Commission to cite the sections of the Act which give the Commission such authority as the Commission feels it may have as to these matters, so that Seatrain may proceed to file a proper complaint before the Commission to obtain the relief it seeks.

The last-cited quotations from the railroad defendants' brief compel the conclusion that they ascribe to the Court's decision the holding that the various examples offered by Seatrain to illustrate to the Court the abuse of processes prior to and subsequent to November 30, 1951, were all related to the "interchange and use of freight cars owned by railroads".

One of the examples referred to above, submitted to the Court, dealt with the joint action of the railroad defendants in endeavoring to have set aside the Commission's order granting Seatrain temporary authority to operate between New York and Savannah, *Alabama Great Southern R. Co.* v. *United States, supra.* That action was commenced immediately after Seatrain announced that its first sailing, pursuant to such authority, would be on November 30, 1951. Much publicity was given to the fact that the railroad defendants were seeking court action to stop the first sailing. The final decision of the three-judge statutory court was dated January 9, 1952 (103 F. Supp. 223).

Following the decision, the railroad defendants had until April 10, 1952, to appeal from the decision of the statutory court. Accordingly, uncertainty with respect to the continuance of Seatrain's service remained for thirteen weeks. During this period, Seatrain had great difficulty in persuading shippers and consignees to use its service. By reason of these actions of the railroad defendants, Seatrain suffered substantial losses. Certainly those actions are not prohibited by nor declared to be unlawful in the Interstate Commerce Act, nor can they be deemed to have been "subsidiary" or "incidental" to any question of jurisdiction over cars. An examination of the contentions of the railroad defendants in that proceeding and the reply brief of Seatrain filed in connection therewith clearly demonstrates that the statutory court action (103 F. Supp. 223) was neither instituted nor prosecuted by the defendants in good faith or with probable cause.

Another illustration given to the District Court, of actions taken by railroad defendants in proceedings before the Commission and before the Federal Court, which caused Seatrain grave injury, was in connection with the amendment of the Commission's order in Docket No. 25727, *Seatrain Lines, Inc.* v. *Akron, C. & Y. Ry. Co., supra,* pertaining to the publication of joint rates with Seatrain via New York and New Orleans. This case was cited to the Federal Court as an illustration of the abuse of processes. A detailed review of the actions of certain railroad defendants in challenging in the Federal Courts, after the culmination of the Commission's administrative functions, the report and order of the Commission duly and properly made upon an exhaustive record, clearly shows that their actions were taken in bad faith and without probable cause and, in no way, were related to the extent of the Commission's jurisdiction over the use of cars.

As indicated hereinbefore, at page 8 of the railroad defendants' brief herein, there appears the following statement:

> "On October 24, 1952, Judge Forman filed a careful opinion holding that the matters complained of were within the primary jurisdiction of the Interstate Commerce Commission *or* were subsidiary matters incidental to the principal allegations of the complaint and so insufficient to confer jurisdiction upon the court." (Emphasis supplied)

The gratuitous insertion of the "or", emphasized above, is not only unwarranted but is contrary to the actual decision. Its insertion creates confusion and distortion. It should be disregarded.

(B) The Railroad Defendants and the Association Misconceive and Misstate the Underlying Objective of the Petition for the Issuance of Declaratory Orders.

It is evident that the railroad defendants, in seeking dismissal of the petition for the issuance of declaratory orders herein, misconceive or refuse to recognize the basic objectives of the petition. The petition for the issuance of declaratory orders, as well as this reply brief, clearly and as potently as language permits, stress that Seatrain is not seeking relief in the way of damages from, or orders precluding, alleged improper acts or violations of the law. It merely seeks ascertainment of the tribunal to which, and the sections of the law under which, it might proceed to obtain relief. The railroad defendants' brief is postulated upon the proposition that the petition for the issuance of declaratory orders actually seeks, now and here, the relief that would be sought only after adjudication of the declaratory order petition and the subsequent filing of appropriate proceedings before the proper authorities under determined provisions of law.

At pages 36 and 37 of the railroad defendants' brief, it is stated:

> "The establishment of conditions of car-interchange and the grant of reparation are matters of adjudication which may be determined only after hearing. (Citations) To this extent the questions presented by the petition are fit subjects for consideration under Section 5(d) of the Administrative Procedure Act. The declaratory orders, however, may be issued only after hearing is held."

This petition for the issuance of declaratory orders does not seek the establishment of any "conditions," nor does it seek the "grant of reparation"! If it did, we would agree with the railroad defendants that hearings are necessary. If it did, we would agree that "it raises issues that cannot be determined in the abstract or without regard to the facts" (page 43 of brief). If it did, we would agree that hearings are necessary to make "findings with respect to what is needed to insure the movement of interstate commerce without interruption or delay. These findings obviously depend upon facts" (page 43 of brief). If it did, we would agree that hearings are required so that "full factual data regarding such matters are before the Commission" (page 43 of brief).

If relief were here sought in the way of orders concerning the terms and conditions of car interchange, we would agree that hearings would be necessary, for:

> "The question then is a factual one: what is necessary by way of car interchange to insure that commerce moves without interruption or delay or, if the Court's phrasing be employed: what Commission orders will eliminate the possibility that 'Seatrain cannot function'?" (page 44 of brief)

If the declaratory petition sought specific relief under and pursuant to certain sections of the Act, or if the petition herein sought orders that either required carriers to desist from violations of the law or to comply with certain provisions of the law, *which it definitely does not,* then hearings would clearly be necessary. In view of the nature of the petition and the specific declaratory orders sought thereby, setting forth whether the Commission has jurisdiction and, if so, under what section or sections of the Act, the railroad defendants' discussion relative to hearings prior to the grant of reparation or the establishment of car interchange conditions and the like are all immaterial and irrelevant to the petition herein.

Clearly the railroad defendants and the Association misconceive and misstate the underlying objective of the petition for the issuance of declaratory orders!

III. The Complaint in Docket No. 31014 Continues to Be Used As a Device to Confuse and Abuse Legal Processes. It Should Be Dismissed Forthwith.

(A) The Question Whether the Commission Has Unlimited Jurisdiction Over All Cars Used In Connection With Seatrain's Services Is Not Before the Commission in Docket No. 31014.

The railroad defendants and the Association request the Commission not to issue the declaratory order sought with respect to the matter of the Commission's jurisdiction to require railroads that do not participate in or maintain through routes with Seatrain to permit their cars to be used in connection with Seatrain because, it is contended, this issue is pending before the Supreme Court. However, it should be observed that, while concurrently so urging the Commission not to act pursuant to the petition for declaratory orders, the railroad defendants and the Association are requesting the Supreme Court not to pass on this question because it is before the Commission. At pages 5 and 6 of Exhibit A, the following statement appears:

> "The basic question [jurisdiction over cars] which the petitioner now asks this Court to consider is, therefore, together with others, now at issue before the Interstate Commerce Commssion."

Evidently the contention that the matter of the Commission's jurisdiction over cars is now at issue before the Commission has reference to the complaint filed by railroad defendants with the Commission in Docket No. 31014, which is referred to at page 8 of Exhibit A as follows:

> "Nor, indeed, is any reason given why petitioner should rush to this Court prior to the Commission's own re-examination of the issue; that re-examination is involved in respondent railroads' complaint filed with the Commission in March, 1952, * * *."

These quoted statements made to the Supreme Court are not in accordance with the facts. The attention of the Commission is called thereto because this constitutes the latest attempt of the railroad defendants to mislead a Federal court with respect to matters pending before the Interstate Commerce Commission.

The railroad defendants and the Association have made no attempt to disprove or deny the statements, contained in Seatrain's petition for the issuance of declaratory orders, that the complaint in Docket No. 31014 is not based upon the possession by the Commission of that unlimited jurisdiction over the use of cars which the railroad defendants and the Association asserted to the District Court. Rather, the complaint is based upon the limited jurisdiction which the Commission found it had in Docket No. 25565, *Investigation of Seatrain Lines, Inc.*, 206 I. C. C. 328; Docket No. 25727, *Seatrain Lines, Inc.* v. *Akron, C. & Y. Ry. Co., supra,* and Docket No. 25728, *Hoboken Mfrs. R. Co.* v. *Abilene & S. Ry. Co.*, 248 I. C. C. 109. Furthermore, the petition for the issuance of declaratory orders stressed the fact that the Association was neither a complainant nor a defendant in the complaint, Docket No. 31014, as it would have to be if there were involved therein any issue relating to jurisdiction by the Commission over cars of railroads which do not participate in or maintain through routes with Seatrain.

The railroad defendants, which are the complainants in Docket No. 31014, are railroads which have been, since 1932, and are now, parties to through routes with Seatrain in all of its services. Merely because some of the railroad defendants deny this fact does not alter it. In any event, the railroad defendants not only have asked the Commission to establish through routes with Seatrain but on page 8 of Exhibit A the following statement appears:

> "All of the railroads named as defendants in that proceeding [anti-trust case] and against which relief is sought are railroads that are admittedly in a position to be parties to through routes with Seatrain."

Since the decision of the Supreme Court in *United States* v. *Pennsylvania R. Co.*, 323 U. S. 612, the railroad defendants and the Association have repeatedly recognized the authority of the Commission to require railroads which participate in or maintain through routes with Seatrain to permit their cars to be used in connection with Seatrain service. Exhibit 40* in the anti-trust proceeding graphically illustrates the territory in which are located the railroads over which the Commission has jurisdiction with respect to the use of their cars in Seatrain's New York-Savannah service. All of the railroad defendants are included therein. Neither Seatrain, the railroad defendants, nor the Association in any proceeding heretofore, since the Supreme Court affirmed the Commission's decision in Docket No. 25728, *Hoboken Mfrs. R. Co.* v. *Abilene & S. Ry. Co.,* supra, has challenged or questioned the Commission's authority to require railroads which participate in or maintain through routes with Seatrain to permit their cars to be so used. The railroad defendants and the Association, as shown in the quotation above from their joint brief (Exhibit A), appear not to challenge such authority. However, the railroad defendants in their brief herein now assert a brand new interpretation of the extent of the jurisdiction of the Commission.

The question here before the Commission is whether or not the Commission has authority over cars of railroads which do not participate in or maintain through routes with Seatrain. Such railroads are those whose cars are not subject to the jurisdiction of the Commission under its decisions in Docket No. 25565, *Investigation of Seatrain Lines, Inc.,* supra, Docket No. 25727, *Seatrain Lines, Inc.* v. *Akron, C. & Y. Ry. Co.,* supra, and Docket No. 25728, *Hoboken Mfrs. R. Co.* v. *Abilene & S. Ry. Co.,* supra, whereas the cars of the railroad defendants are subject to the Commission's jurisdiction, as heretofore shown and admitted. The complaint in Docket No. 31014 is confined to cars of railroad defendants and other railroads which have, or may be required to establish, through routes with Seatrain. As a matter of fact, the prayers for relief in the aforesaid complaint, insofar as cars are concerned, are definitely and unequivocally limited and restricted to the use of cars of railroads that participate in or maintain through routes with Seatrain. Specifically, Prayers 4 and 6 of the complaint, which are the only prayers relating to the use of cars, are limited in that manner. Those prayers read as follows:

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* Exhibit 40 annexed to the affidavit submitted by Seatrain in support of its Application for Preliminary Injunction.

> "(4) Requiring Seatrain to provide reasonable facilities for operating such through routes as may be in existence or prescribed, now or hereafter, including an equitable portion of the cars attributable and appropriate to its use, or in the alternative, requiring Seatrain to pay a per diem rate which shall fully reflect its peculiar and unusual character and type of car use;"
>
> "(6) Fixing reasonable terms and conditions under which such through routes shall be operated and all terms and conditions of car use to be observed by Seatrain, including the compensation to be paid by Seatrain for its use of railroad cars, and the manner and method of payment;"

The complaint seeks establishment of through routes by the Commission and recognizes the Commission's authority to require the use of cars of all railroads participating therein. Nowhere in said complaint, Docket No. 31014, is any issue raised with respect to the use of cars by railroads that do not participate in or maintain through routes with Seatrain and whose cars are therefore not subject to the jurisdiction of the Commission as defined in Docket No. 25565, *Investigation of Seatrain Lines, Inc.*, supra, Docket No. 25727, *Seatrain Lines, Inc.* v. *Akron, C. & Y. Ry. Co.*, *supra,* and Docket No. 25728, *Hoboken Mfrs. R. Co.* v. *Abilene & S. Ry. Co., supra.* The railroad defendants and the Association now are thus misrepresenting to the Supreme Court of the United States the nature and contents of said complaint. The prayers in said complaint do not raise any issue with respect to the jurisdiction of the Commission over cars of railroads which do not maintain or participate in through routes with Seatrain.

(B) There Is No Issue Herein Involving the Terms and Conditions in Connection with the Use of Cars in Seatrain's Services.

The railroad defendants and the Association failed to make clear to the Supreme Court that the railroad defendants, for the nineteenth and twentieth times, by their briefs to the Supreme Court and the Commission herein, are raising the issue and are challenging the Commission's decision with respect to the terms and conditions pertaining to the use of their cars in connection with Seatrain. There is no issue as to terms and conditions with respect to the use of cars now before the Commission in this proceeding. As to this matter, on page 4 of Exhibit A there appears this statement:

> "From the previous litigation there has not emerged a definitive solution of the controversy."

As was pointed out in the petition for the issuance of declaratory orders, the railroad defendants by their complaint, Docket No. 31014, are again attempting to have the Commission reverse its findings, which were affirmed by the Supreme Court, with respect to the terms and conditions in connection with the use of cars. Seatrain is seeking relief from such continuous attacks upon orders of the Commission. It does not subscribe to the theory that decisions of the Commission, rendered after years of the most exhaustive litigation, which have been upheld by the Supreme Court and which have been accepted by practically every railroad in the country except the railroad defendants, are subject to repeated reviews by the Commission and the Supreme Court. Having found no means of stopping the railroad defendants and the Association from repeatedly challenging the decisions of the Commission and the Supreme Court in this respect, while violating Commission orders in many other respects, and thus keeping Seatrain in constant litigation and uncertainty, Seatrain brought the anti-trust proceeding hoping to find relief from these tactics and the repeated misrepresentations made to the Commission and the Federal Courts by the railroad defendants and the Association.

(C) There Is No Issue Herein Concerning the Status of Seatrain as a Water Carrier Subject to Part III of the Act, and Efforts to Inject Such Issue are Improper and Meaningless.

The Commission's attention is directed to still another attempt by the railroad defendants and the Association to confuse and distort matters pertaining to the use of cars in Seatrain's service. At page 4 of Exhibit A, the railroad defendants and the Association make the following statement to the Supreme Court:

> "The basic question running through all these proceedings is whether the Commission should deal with Seatrain as though it were a break-bulk water carrier or as though it were a rail carrier. It is in fact neither, but instead a rail carrier by water."

In its petition for the issuance of declaratory orders (Volume 1, pp. 25-26) Seatrain listed eight proceedings in which the railroads have challenged the status of Seatrain as a carrier. Seatrain did this to show the number of instances in which the Commission and the Supreme Court were called upon to affirm that Seatrain is a common carrier by water subject to Part III of the Interstate Commerce Act. Once more the railroad defendants and the Association are advising the Supreme Court that they are seeking again to induce the Commission to ignore or reverse its previous decisions and those of the Supreme Court. Nowhere in the Interstate Commerce Act is there any provision for regulating "rail carriers by water." Obviously the Commission will not attempt to regulate Seatrain except in accordance with the provisions of the Interstate Commerce Act and, in so doing, it will zealously guard against being persuaded, again, by the railroad defendants from doing otherwise.

The Supreme Court, once before, had been called upon to decide this fundamental question. In *Seatrain Lines, Inc., Common Carrier Applications,* 260 I. C. C. 430, the railroad defendants, other than the Erie Railroad and the Baltimore and Ohio Railroad, requested the Commission to cancel Seatrain's certificate of public convenience and necessity and issue a new one severely limiting its operating authority. In the oral argument before the Commission (as shown at page 395 of the Transcript of Record filed in the Supreme Court of the United States, October Term, 1946, No. 61, *United States* v. *Seatrain Lines,* 67 S. Ct. 435), there appears the following statement made by counsel for the railroad defendants:

> "I would like to discuss primarily on behalf of these railroads the point that Seatrain service is so unique and so different from that of other water carriers as not to warrant a certificate of the scope previously issued."

Seatrain's original certificate was issued to it as a common carrier, by water, of commodities generally and authorized operations between the Ports of New York, New Orleans and Texas City. The original certificate was canceled by the Commission and a new certificate, conforming with the views of railroad defendants that Seatrain should be a "rail carrier by water", was issued. As the result of the unanimous decision of the Supreme Court, *United States* v. *Seatrain Lines, supra,* Seatrain's original certificate was restored to it.

In the anti-trust proceeding, Seatrain is seeking relief from the constant attack, by railroad defendants, against its status as a water carrier subject to Part III of the Interstate Commerce Act.

(D) Positions Taken by Railroad Defendants and the Association Over the Years, Before Various Tribunals, As To the Jurisdiction of the Commission Over Cars For Use In Connection With Seatrain, Have Been Inconsistent, Conflicting and Contradictory.

In its petition for the issuance of declaratory orders, Seatrain pointed out that the railroad defendants and the Association, for years, had contended that the Commission lacked authority to require the cars of any railroad to be used in connection with Seatrain service. Upon appeal from the Commission's decision in *Hoboken Mfrs. R. Co.* v. *Abilene & S. Ry. Co., supra,* the railroad defendants (the Erie Railroad and the Baltimore and Ohio Railroad excepted) continued to maintain the position that the Commission lacked jurisdiction over any cars for use in connection with Seatrain. Since the decision of the Supreme Court, *United States* v. *Pennsylvania R. Co., supra,* the railroad defendants and the Association, except as heretofore indicated, have maintained the position that the Commission's jurisdiction over cars was limited, as found by the Commission, to cars belonging to railroads which participated in or maintained through routes with Seatrain.

In the anti-trust proceeding, however, the railroad defendants and the Association asserted that the Commission's jurisdiction with respect to the use of railroad cars in connection with Seatrain was unlimited. Seatrain pointed out that nowhere, theretofore, had any such admission been made and questioned whether the railroad defendants and the Association would maintain in any proceeding before the Commission the position which they had so taken before the Federal Court. That uncertainty was one of the reasons asserted by Seatrain for seeking a declaratory order with respect to the jurisdiction of the Commission. That Seatrain was justified in seeking that declaratory order is now established by the briefs filed by the railroad defendants and the Association herein.

The Association, in its brief herein, adheres to the position which it took before the Federal Court, that the Commission's authority is unlimited. The railroad defendants, however, in urging that the Commission do not issue the declaratory orders, whittle down and retract from the position taken before the Federal Court and eventually conclude that *the extent of the Commission's jurisdiction* is not defined by any provision of the Act but depends upon a detailed inquiry as to:

> "* * * Seatrain's need, the car supply now available to it, the degree to which Car Service Rule 4 interferes with its operations, etc." (P. 45 of brief)

On page 46 of the same brief, the following statement appears:

> "Here again a fair answer to the question of *the exact dimensions of the Commission's jurisdiction* can be made only after full hearing and not in response to abstract questions." (Emphasis supplied)

Those statements are wholly at variance with those made to the Federal Court. Any provision of the Interstate Commerce Act that sought to define the Commission's jurisdiction in such a vacillating manner would be directly contrary to the provisions of the National Transportation Policy. No water carrier, such as Seatrain, could long stay in existence if the Commission's jurisdiction changed from time to time, varied with respect to each of its services, and was dependent upon such other factors as those enumerated by railroad defendants. There being no provision in the Act so defining the Commission's jurisdiction, it is neither proper nor lawful to so interpret existing law, because of the provisions of the National Transportation Policy which the Supreme Court interpreted in *United States* v. *Pennsylvania R. Co., supra,* as follows:

> "The interrelationship of the three parts of the Act was made manifest by its declaration of a 'national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act, so administered as to recognize and preserve the inherent advantages of each.' " (323 U. S. 612, 616)
>
> * * *
>
> "This policy cannot be carried out as to Seatrain's interstate carriage unless railroads interchange their cars with it. The particular type of service introduced by Seatrain, and found by the Commission to be qualitatively superior, cannot be rendered without the privilege of carrying the very railroad cars which carry freight to its ports. The 'inherent advantages of this service' would be lost to the public without railroad car interchange." (323 U. S. 612, 617)

(E) The Assertion That There Are Long-Standing and Unsettled Disputes Between Seatrain "and the Railroads", Is Wholly Without Foundation.

The railroad defendants, in their brief herein, urge the Commission not to issue the declaratory orders sought but to proceed, at some unnamed and wholly undeterminable date, with hearings in connection with the complaint in Docket No. 31014. They allege that Seatrain then would have an opportunity, by cross-complaint, to inject the questions which it raises in its petition for the issuance of declaratory orders. As Seatrain has dealt with this particular subject at length in its petition and has filed a complete answer in Docket No. 31014, and as neither the railroad defendants nor the Association has taken any action to dispute or deny the contentions made by Seatrain with respect to said complaint, the Commission is urged to dismiss that complaint forthwith, not only for the various reasons heretofore given but also to prevent the railroad defendants and the Association from continuing to misrepresent to the Federal Courts the purposes and contents of said complaint.

Seatrain also pointed out at length that the complaint was so drawn as to make it appear that various matters were in issue between Seatrain "and the railroads" of the United States, whereas, in fact, the issues raised with respect to Seatrain's Gulf services are confined to disputes between Seatrain and The Pennsylvania Railroad Company alone. As to Seatrain's Savannah service, the dispute, as indicated, is primarily between Seatrain, on the one hand, and The Pennsylvania Railroad Company, Atlantic Coast Line Railroad Company, Seaboard Air Line Railroad Company, and Southern Railway Company, on the other, because other New England, Eastern and Southern railroads were and are cooperating, to a large extent, with Seatrain in connection with the operation of that service, having recognized the existence of through routes, having permitted their cars to be used, having issued through bills of lading, and otherwise having done business in a normal, lawful fashion. It was pointed out that numerous railroads were considering the publication of joint rail-and-water rates with Seatrain in that service, and, since the filing of the petition herein, the following railroads have published such joint rates with Seatrain and have agreed upon the divisions thereof with Seatrain:

- Boston and Albany Railroad
- Boston and Maine Railroad
- The Delaware and Hudson Railroad Corporation
- Erie Railroad Company
- The Lehigh and Hudson River Railway Company
- Lehigh and New England Railroad Company
- Maine Central Railroad Company
- The New York Central Railroad Company
- The New York, New Haven and Hartford Railroad Company
- New York, Susquehanna and Western Railroad Company

While all of these facts are known to the railroad defendants and the Association, nevertheless in their brief, Exhibit A, they stress to the Supreme Court that the disputes are between the railroads of the United States and Seatrain. On page 5 thereof, the following statement appears:

> "The respondent railroads believed that the controversy between Seatrain and *the railroads* should receive a definitive and speedy determination by the agency vested with statutory authority to determine the basic issues involved. They, accordingly, filed, on March 26, 1952, a complaint with the Interstate Commerce Commission asking for a comprehensive examination and decision of the many issues between Seatrain and *the railroads*." (Emphasis supplied)

Similar misrepresentations were made to the District Court for the District of New Jersey which, no doubt, led Judge Forman to the conclusion that said complaint, in Docket No. 31014, would serve as a means of settling the long-standing controversies between Seatrain "and the railroads".

(F) Enforced Compliance with the Commission's Outstanding Orders Will Result In Automatic Disposition of Basic Prayers For Relief In Docket No. 31014.

In view of the continued misrepresentation by the railroad defendants and the Association with respect to the complaint, Docket No. 31014, and in particular with respect to all of the issues raised therein concerning Seatrain's Gulf services, which in fact are not in dispute between any railroad and Seatrain, except The Pennsylvania Railroad Company, Seatrain urges the Commission to pursue the most vigorous action in the enforcement of its orders in *Borough of Edgewater, N. J.* v. *Arcade & A. R. Corp., supra,* and Docket 25727, *Seatrain Lines, Inc.* v. *Akron C. & Y. Ry. Co., supra,* and in particular calls the Commission's attention to the fourth ordering paragraph of its order in Docket No. 25727, *Seatrain Lines, Inc.* v. *Akron, C. & Y. Ry. Co.,* which reads as follows:

> "It is further ordered, That said defendants, according as they participate in the transportation, be, and they are hereby, notified and required to cease and desist, on or before May 1, 1941, from the unlawful discrimination between complainant, on the one hand, and the Southern Pacific Company (Southern Pacific Steamship Lines, Morgan Line) and the Pan-Atlantic Steamship Corporation, on the other hand, which has been found to exist with respect to ocean-rail rates, and thereafter to maintain ocean-rail rates between points referred to in the next preceding paragraph in connection with complainant which shall not exceed concurrent rates between the same points in connection with the Southern Pacific Company (Southern Pacific Steamship Lines, Morgan Line) and the Pan-Atlantic Steamship Corporation via New York, N. Y., and New Orleans, La., on corresponding traffic similarly packed and prepared for shipment."

Appendix E

The Pennsylvania Railroad Company is the only railroad which has not established joint rates in connection with Seatrain's Gulf services. Since March 12, 1947, when Seatrain restored coastwise operations following World War II, The Pennsylvania Railroad Company has consistently failed and refused to establish joint rates with Seatrain while contemporaneously maintaining joint rates with the Pan-Atlantic Steamship Corporation between New York and New Orleans. Enforcement of the aforesaid orders will cause most of the issues in the complaint, Docket No. 31014, to become moot and will eliminate a substantial part of the existing controversy. The Pennsylvania Railroad Company, in effect, by the complaint in Docket No. 31014, requests the Commission to desist from enforcing its orders directing the railroad defendants therein, including The Pennsylvania Railroad Company, to establish joint rates (ocean-rail rates) with Seatrain, pending the issuance of new orders to establish the joint rates sought by the complaint in Docket No. 31014.

It is respectfully submitted that the complaint in Docket No. 31014 is a request upon the Commission to make a farce of regulation. If the present orders of the Commission are not to be obeyed, there is no need for the issuance of further orders. We are confident, therefore, that for this, as well as for other reasons heretofore cited, the Commission will dismiss the complaint in Docket No. 31014 but, in view of the misrepresentations with respect thereto, which are being made to the Supreme Court, as shown in Exhibit A, Seatrain prays that the Commission dismiss the complaint forthwith. A copy of Seatrain's answer to the joint brief of railroad defendants and the Association filed with the Supreme Court (Exhibit A) is attached hereto as Exhibit B.

Were the Commission's outstanding orders to be enforced, immediately there would result automatic disposition of the basic prayers for relief in Docket No. 31014. Compliance with those orders would afford a complete answer to those basic prayers for relief and render them meaningless.

IV. Procedural Matters With Respect to Section 5(d) of the Administrative Procedure Act.

(A) The Declaratory Orders Here Sought Would Determine In Full the Controversy Involved.

The declaratory orders herein are sought to terminate a controversy and to remove uncertainty relative to the jurisdiction of the Interstate Commerce Commission to act, and the specific provisions of the law enabling the Commission to so act, as to the two queries set forth in the petition for declaratory orders. The confusion and uncertainty that exist and that are sought to be resolved by the instant petition exist wholly and solely before the Interstate Commerce Commission and with respect to its jurisdiction. Determination of those queries will remove the controversy and uncertainty insofar as they exist before the Interstate Commerce Commission.

It is true that determination of the petition for declaratory orders will not determine all issues in other and unrelated cases, nor will it terminate all other cases, but it will determine and thus terminate, with finality, the controversy and uncertainty that exist before the Interstate Commerce Commission, to the extent of the Commission's ability to finally determine any matter before it, as to its jurisdiction and the section or sections of the Act under which relief may be sought.

The railroad defendants ask that the Commission not act in connection herewith because "declaratory orders issued at this time would be subject to judicial review" (p. 34 of brief). All declaratory orders are subject to judicial review, as are most orders of the Interstate Commerce Commission. Does that constitute a valid reason for refusing to act? If so, the provisions of Section 5(d) of the Administrative Procedure Act and many, if not most, of the other sections of the law would become meaningless. To the extent that decisions of this Commission are reviewable by the Courts, the Commission cannot finally settle issues by its decisions. It can, however, by decision and order, cause matters before it to be brought to a stage of Interstate Commerce Commission finality. That is what the petition for declaratory orders here seeks.

It is alleged that the petition for declaratory orders should be dismissed because the orders sought would not settle the actual controversy in the anti-trust case (pp. 28 and 34 of brief). Obviously, that is true. The principal relief sought in the anti-trust case is in connection with conspiratorial "unfair competitive practices" for which substantial monetary damages are sought. As to that matter, the railroad defendants affirmatively admit that the Commission does not possess the necessary jurisdiction (p. 41 of brief):

> "If Seatrain were seeking damages based solely upon allegations of harassing and unfair litigation, unrelated to any alleged ends of depriving it by such harassment of rights under the Act, whether by concerted or individual action, then certainly there is no authority in the Commission to order reparation."

The brief of the Association makes no such admission. However, it states nothing to the contrary.

If the Commission should find that it has no jurisdiction over the "unfair competitive practices" alleged, which are violations of other than specific sections of the Act, clearly it could not determine the controversy, existent in the anti-trust case, of whether damages should be issued and the amount thereof. However, the Commission's determination by declaratory orders herein certainly would terminate the controversy and remove the uncertainty of its jurisdiction and the ability of a litigant to petition the Commission for relief relative thereto.

Again, it is stated that a declaratory order of the Commission will not settle the controversy involved in Docket No. 31014 (pp. 28, 29 and 34 of brief). That statement clearly is true. Docket No. 31014 precipitates many, many issues that in no wise involve or affect the petition for the declaratory orders sought. Docket No. 31014 in no way relates to or involves damages resulting from "unfair competitive practices" and violations of other than specific sections of the Act. Declaratory orders relative to the Commission's jurisdiction and the sections of the law that confer jurisdiction upon the Commission relative to "unfair competitive practices" obviously could neither settle nor determine the unrelated issues involved in Docket No. 31014. To the extent that the petition seeks declaratory orders relative to the Commission's jurisdiction, and the sections of the Act conferring such jurisdiction, to require railroads which do not participate in or maintain through routes with Seatrain to permit interchange of their freight cars with Seatrain, it clearly could not adjudicate Docket No. 31014.

From the foregoing it is apparent that the declaratory orders herein, although subject to judicial review and although not capable of determining all controversies existing in other and unrelated proceedings, unequivocally will terminate a controversy and remove uncertainty in full before this Commission relative to the jurisdiction of the Commission, the sections of the Act conferring that jurisdiction, and the sections of the Act which, when properly alleged to be violated, would constitute the basis for the filing of valid complaints.

(B) The Declaratory Orders Here Sought Are Not Part of a Controversy; their Issuance Is Necessary and Vital for Proper Legal Procedure.

At page 5 of the railroad defendants' brief it is stated:

> " * * *, the petition is unnecessary because other proceedings are already pending before the Commission in which those questions can more properly be decided."

Nowhere in the brief do the railroad defendants indicate in what other proceedings the precise queries herein advanced are pending and may or will be determined. The only other proceeding pending before the Commission, to which reference is made in the brief, is Docket No. 31014. It has already been established that the queries involved in the petition herein are in no wise involved in that proceeding. It has been shown that determination of the issues in Docket No. 31014 can neither answer nor affect the queries propounded in the instant petition.

At page 9 of the brief, the railroad defendants state:

> "There is now pending before the Commission a broad-based complaint seeking definitive adjudication of the long standing and extensive controversies existing between Seatrain and the railroads. That complaint raises the car service issue and asserts the Commission's jurisdiction to settle that issue in broadest terms."

As has been reiterated hereinbefore, the complaint in Docket No. 31014 deals with the use of cars as facilities to be supplied only by railroads which participate in and maintain through routes with Seatrain. The petition for declaratory orders, on the other hand, relates to the use of cars only in connection with railroads which do not participate in or maintain through routes with Seatrain. Clearly, the railroad defendants' assertion that settlement of this issue is sought "in broadest terms" is inconsistent with the complaint itself.

It is most difficult to understand the railroad defendants' conception of proper legal procedure when they state at page 28 of their brief as follows:

> "The abuse of process issue, though mentioned in the Answer, is not before the Commission, Seatrain having sought no relief from the Commission on that account as it might have done by cross complaint."

Can it be that the railroad defendants are seriously asserting that litigants should institute and process cases before a tribunal that is wholly devoid of jurisdiction? Do they seriously assert that Seatrain should have filed, or should now file, a cross complaint as to a matter that the railroad defendants affirmatively admit is beyond and without the scope of the Commission's jurisdiction? At page 41 of their brief, the railroad defendants affirmatively admit that:

> "If Seatrain were seeking damages based solely upon allegations of harassing and unfair litigation, unrelated to any alleged ends of depriving it by such harassment of rights under the Act, whether by concerted or individual action, then certainly there is no authority in the Commission to order reparation."

If the Commission has no jurisdiction to order reparation, which is another way of stating that the Commission has no jurisdiction over the subject matter hereof, what would be gained by filing a cross complaint before the Commission, dealing with that matter? Similarly, what would be gained by filing a separate complaint with the Commission seeking that relief until and unless the controversy and uncertainty as to the Commission's jurisdiction and the specific sections of the Act under which that jurisdiction is obtained are determined? To merely raise these questions is to point up the validity and necessity for the issuance of the declaratory orders sought.

The railroad defendants urge that the Commission hold hearings before issuing declaratory orders because after hearings "the Commission here too may find that the conduct of the railroads has been justified and proper and consequently have no need to reach any nice measurements of the extent of its jurisdiction" (p. 41 of brief). Similarly, it is stated "examination of the facts regarding car interchange may well indicate that Seatrain has not been hurt and for that reason alone the time is not yet at hand for a Commission decision that its authority extends further than the point reached in earlier proceedings" (p. 40 of brief).

Here, again, the railroad defendants pose a proposition that is clearly contrary to law. The position of the railroad defendants here appears to be that the matter of jurisdiction is secondary to the merits of the case; that the judicial or quasi-judicial body, devoid of jurisdiction, may usurp jurisdiction for the purpose of determining whether there be merit to the cause before it. Carrying this proposition to its logical conclusion would mean that if the Court found there was no merit in the cause it would dismiss it even though it lacked jurisdiction. Contrariwise, if after full and complete hearing, if the Court found merit in the cause before it, then presumably it would retroactively consider the matter of jurisdiction and only at that time would it dismiss the cause for lack of jurisdiction. Fortunately for litigants, that is not the law.

> "Since lack of jurisdiction of a federal court touching the subject matter of the litigation cannot be waived by the parties, we must upon this appeal examine the contention; and, if we conclude that the District Court lacked jurisdiction of the cause, direct that the bill be dismissed." *United States* v. *Griffin*, 303 U. S. 226, 229.

> "Unlike an objection to venue, lack of federal jurisdiction cannot be waived or be overcome by an agreement of the parties. An appellate federal court must satisfy itself not only of its own jurisdiction, but also of that of the lower courts in a cause under review." *Mitchell* v. *Maurer,* 293 U. S. 237, 244.

The railroad defendants do not indicate under what authority or law the Commission could assume jurisdiction over matters in connection with which it has no statutory authority to act. The railroad defendants do not indicate how the Commission may receive evidence relating to the merits of matters brought before it in connection with other than specific violations of provisions of the Interstate Commerce Act. The failure and refusal of the railroad defendants to so indicate is easily explained. The Commission has neither authority nor power so to do.

(C) The Petition for Declaratory Orders Herein is Properly Filed Under Section 5(d) of the Administrative Procedure Act, and the Commission should affirmatively Act Upon the Petition.

In *Atlantic Frt. Lines, Inc — Petition For Declaratory Order,* 51 M. C. C. 175, because the certificate which was the subject matter of the interpretation sought was issued pursuant to Section 206(a), and since a proceeding under that section is not one which is required by statute to be determined on the record after opportunity for agency hearing, the Commission held that the provisions of Section 5(d) of the Administrative Procedure Act were not applicable. That situation is not existent here. However, it is significant to note that, while finding that the petition was not one properly subject to the provisions of Section 5(d) of the Administrative Procedure Act, the Commission nevertheless undertook to afford the interpretative relief sought. Furthermore, it is significant to observe that the

Commission undertook this activity notwithstanding that an interpretation directly contrary to that of the Commission had been made by the Pennsylvania Superior Court and a writ of certiorari had been denied by the United States Supreme Court. The Commission held, and properly so, that it was the body charged with the administration of the Interstate Commerce Act and thus it is the Commission's duty to clarify matters under its jurisdiction. (That determination should be compared with the request to clarify the jurisdiction of and procedure before the Interstate Commerce Commission sought here.)

The Commission specifically found in *Atlantic Frt. Line, Inc. — Petition For Declaratory Order, supra*:

> " * * *, it may be observed that we do not construe the superior court's decision as intending that its interpretation shall constitute a final and binding adjudication of the matter or as denying to us this subsequent right to interpret our own order even though our interpretation be contrary to its own. Examination of the decision, quoted in part earlier herein, discloses that the court considered that primary jurisdiction to determine the bona fides of interstate transportation is vested in this Commission; and was of the further opinion that when we have determined the matter and have authorized transportation of the character involved herein, our order designating such transportation as interstate commerce is binding on the State and cannot be questioned collaterally. The fact that the court, for reasons heretofore shown, felt justified in interpreting our order collaterally does not preclude us from entertaining, and affording, the relief sought in the instant petition, for it cannot be disputed that it is the province of this Commission to interpret its own orders, and that its interpretations cannot be ignored by the courts unless clearly erroneous or

> arbitrary. *Adirondack Transit Lines, Inc.* v. *United States,* 59 Fed. Supp. 503 (affirmed 324 U. S. 824). Nor does the fact that the Supreme Court has denied certiorari alter our jurisdiction in the matter, for that Court itself has repeatedly said that denial of certiorari imports no expression of opinion on the merits of controversy. *Sunal* v. *Large,* 332 U. S. 174, 181; *House* v. *Mayo,* 324 U. S. 42, 48, and cases therein cited." (51 M. C. C. 175, 186)

The railroad defendants are adopting an unnatural and unusual attitude here. They are urging the Interstate Commerce Commission not to act because of their contention that the precise issues herein involved are before the Supreme Court. Concurrently they urge the Supreme Court not to act on the same contention that the precise issues before the Supreme Court are before the Interstate Commerce Commission. They urgently request and pray that Seatrain be afforded no relief and that Seatrain be kept in a quandary as to the nature of the Commission's jurisdiction and the provisions of law under which Seatrain can and should proceed to obtain its relief. Obviously the attitude of the railroads herein is not one of seeking to aid in the administration of evenhanded justice but rather to frustrate and prevent the administration of that justice. The railroad defendants are seeking, through unwarranted and unjustified technicalities and attempted improper utilization of the Commission's own procedures, to prevent a carrier, that in good faith seeks to abide with and by the findings and orders of this Commission and the Court, from seeking the relief which it is clearly entitled to obtain.

There is no justifiable reason for the administrative body to refuse to enable a carrier subject to its jurisdiction to seek through legal and lawful methods and means the right to offer and make available to the public the inherent advantages of its "qualitatively superior"* service, to provide adequate, economical and efficient service and otherwise to foster sound economic conditions in its transportation, particularly when the end thereof is the development of a national transportation system by water meeting the needs of the commerce of the United States and the national defense. Prompt affirmative action on the petition for declaratory orders will enable Seatrain to properly proceed to do those things. In the light thereof, the Commission clearly and definitely should find that the petition is properly filed and the Commission should affirmatively act in connection therewith without delay.

V. Based Upon the Petition, the Briefs and the Reply Brief Filed Herein, the Commission Should Issue the Declaratory Orders Sought.

(A) The National Transportation Policy Requires Prompt Affirmative Treatment Of the Petition For Declaratory Orders.

Since the original complaint was filed in *Hoboken Mfrs. R. Co.* v. *Abilene & S. Ry. Co., supra,* on December 30, 1932, Seatrain has been striving to obtain relief from the limitations and conditions imposed upon its ability to operate due to restrictions placed against the use of railroad cars in its service. The chronology of that proceeding (Exhibit I, pp. 132-139, Volume 2 of Petition for Issuance of Declaratory Orders) readily shows the great extremes to which the railroads, defendants therein, utilized the Commission's procedures to protract and delay the ultimate conclusion of that proceeding. The railroads, by their brief herein, indicate that their desire and objective would be to cause another twenty years of litigation before Seatrain could obtain even the simplest relief. Experience has shown that assigning even simple Seatrain issues for hearing results in prolonged and protracted litigation. The Commission should not countenance such activity here.

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* *U. S.* v. *Pennsylvania R. Co.,* 323 U. S. 612.

Through the various phases of the litigation antedating and precipitating the instant petition, the Courts, the Association and the railroads have pointed to, emphasized and relied upon the National Transportation Policy, both as to its actual terminology and as to its spirit. The Commission, itself, repeatedly has stressed its deep concern with the delay in rehabilitation of the domestic ocean-going trades, both coastwise and intercoastal. It has shown itself to be concerned with the formulation of appropriate policies for the fostering of sound economic conditions in this vital form of transportation.

Obviously, Seatrain is vitally interested in the rehabilitation of the coastwise trade, as evidenced by its own actions in instituting and maintaining coastwise services. It, too, is deeply concerned with the formulation of appropriate policies for the fostering of sound conditions in coastwise transportation. In consonance therewith, it urges that administration of the Interstate Commerce Act, in recognition of the basic tenets of the National Transportation Policy, can be accomplished only if there be prompt adjudication of the issues involved in this proceeding.

Were the Commission to require and obtain compliance with its orders presently outstanding in connection with Seatrain matters, as hereinbefore indicated, the complaint in Docket No. 31014 would become moot. Many, if not all, of the basic controversies alleged to exist between Seatrain and "the railroads" would be found to be solved. The future possibilities for continued "unfair competitive practices" by certain railroads would be greatly diminished, if not eliminated, and unnecessarily prolonged and protracted litigation would become a thing of the past.

Fulfillment of the objectives of the National Transportation Policy, as well as the future rehabilitation of domestic water-carrier transportation, is irrevocably and inexorably entwined with the obtainment, by the Commission, of compliance with its outstanding orders. The failure and refusal of certain carriers to comply with those orders should not be permitted to be used as the basis for pleadings such as the complaint filed in Docket No. 31014 and, in turn, as the basis for requesting denial and refusal of pleas for fundamental equity and justice such as would be made available by affirmative action on this petition for declaratory orders.

(B) Seatrain, After Having Been Exposed To Time-Consuming Procedures In Airing Its Problems Administratively, Should Not Be Required To Again Become Involved In Prolonged and Protracted Proceedings, Unless It First Determine the Jurisdiction Of the Administrative Agency and the Appropriate Sections Of the Act Under Which To Proceed.

In all of its activities before the Interstate Commerce Commission, Seatrain constantly was confronted with the unequivocal original position of the railroads, that the Commission possessed neither authority nor jurisdiction over car interchange between railroads and Seatrain. Subsequently, Seatrain was faced with the unwavering contentions of the railroads that such authority as the Commission did possess with respect to car interchange was limited and restricted to cars owned by railroads which participated in or maintained through routes with Seatrain.

After the issuance of unambiguous findings and orders by this Commission relative to its lack of complete jurisdiction over use of railroad cars in Seatrain services, Seatrain proceeded with its anti-trust action. There, to its amazement, it was confronted by railroads, who had previously contended to the Commission that the Commission either had no jurisdiction whatsoever or possessed only limited jurisdiction, now asserting to the Court that the Commission has, and always has had, unlimited and unconditional authority and jurisdiction over the matter. The Association of American Railroads, in its brief filed with the Court in the anti-trust case, asserted that "It would be difficult to imagine more complete jurisdiction over the matter of car service than is thus vested in the Interstate Commerce Commission."

The Court,* in referring to the complaint of Seatrain, properly stated that it alleged:

> "The purpose and effect of said Rule 4, as administered by the Association at the instance of the defendants, is and has been to deny to Seatrain the free use and interchange of cars.
>
> Seatrain has been made the victim of a boycott with regard to the use of cars belonging to the primary defendants and such other parties as they from time to time could induce to deny such use to Seatrain. The Association has acted for all members of the conspiracy in furthering the boycott by imposing and encouraging embargoes against Seatrain and other activities." (P. 10 of Volume 2 of petition of December 10, 1952, for declaratory orders.)
>
> * * *
>
> "As a direct result of the conspiracy Seatrain has been drawn into numerous lengthy proceedings before the Interstate Commerce Commission and the courts ever since its commencement of the operation of coastwise routes in competition with the railroads in 1932. The litigation has been fomented and main-

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* United States District Court for the District of New Jersey, C. 1188/51, *Seatrain Lines, Inc.* v. *Pennsylvania Railroad Company, et al.*, decision reproduced as Exhibit A of Volume 2 of petition of December 10, 1952, for declaratory orders.

> tained, needlessly and vexatiously, by the primary defendants and others in combination with them in order to make more complete the boycott and to drain Seatrain of its financial resources and the energies of its executive officers thereby to weaken Seatrain's operation and development.'' (P. 11 of Volume 2 of petition of December 10, 1952, for declaratory orders.)

The Court also properly recognized that:

> ''Seatrain has engaged in many controversies before the Interstate Commerce Commission and in the review of five of its decisions before the courts. Seatrain views as futile any further appeal to the Commission since it has repeatedly determined that its jurisdiction to compel access to freight cars is limited to through routes between rail and water carriers established pursuant to its order or voluntarily.'' (Pp. 19-20 of Volume 2 of petition of December 10, 1952, for declaratory orders.)

* * *

> ''It is true that the Interstate Commerce Commission has announced a limitation upon its power to direct the interchange and use of railroad cars to Seatrain, as in *Investigation of Seatrain Lines, Inc.*, 206 I. C. C. 328, and that it has also made definitive rulings governing conditions under which the cars were to be used, *Hoboken Manufacturers Railroad Company* v. *Abilene & S. Railway Company,* 248 I. C. C. 109. It is likewise true that Seatrain has made no application to the Commission for a more general use of cars since the decision of the United States Supreme Court in *United States* v. *Pennsylvania R. Co., supra,* in 1945. The pronouncements of the Commission heretofore made are not so final but that in the light of the latter decision it could

> re-examine them under its continuing jurisdiction over its orders pursuant to the provisions of section 16(6) and 17(6), 49 U. S. C., Sec. 16(6) and Sec. 17(6)." (Pp. 27-28 of Volume 2 of petition of December 10, 1952, for declaratory orders.)

In directing Seatrain to again seek its relief from the Interstate Commerce Commission, the Court was constrained to find:

> "It is indeed regrettable that Seatrain should have been exposed to such time-consuming procedures in airing its problems administratively and in the courts." (P. 31 of Volume 2 of petition of December 10, 1952, for declaratory orders.)

It is clear that Seatrain, after having been "exposed to such time-consuming procedures in airing its problems administratively and in the courts" under and pursuant to the provisions of the Interstate Commerce Act, should be hesitant about again becoming involved in time-consuming procedures before the very administrative body that repeatedly has held that it lacked appropriate jurisdiction, unless and until it first be determined that further activity before that body would not be futile because of lack of appropriate jurisdiction. Seatrain likewise would be hesitant about again being involved in a proceeding before that administrative body, so long as it is unaware of the provisions of the Act that now are said to confer unlimited jurisdiction. In the absence of that knowledge, Seatrain obviously would be unable to make allegations and submit proof consonant therewith that would appropriately constitute the rational basis for proper findings and orders by this Commission.

From all of the foregoing, it is patent that the petition herein is properly filed; that the Commission should affirmatively act upon that petition and that the Commission should issue the declaratory orders sought, based upon the petition, the briefs and the replies thereto, filed herein.

Conclusion and Request For the Issuance of Declaratory Orders.

The petition for the issuance of declaratory orders, the briefs, and the reply brief directed thereto inexorably depict the existence of controversies and uncertainties as to the proper tribunal to, and the appropriate authority under which, Seatrain may proceed to obtain the relief to which it is entitled. The exercise of the discretionary power with which the Commission is vested by Section 5(d) of the Administrative Procedure Act clearly would terminate those existing controversies and eliminate the current uncertainties.

Accordingly, Seatrain renews its request that the Commission exercise the powers vested in it by Section 5(d) of the Administrative Procedure Act and, by declaratory orders which will "terminate a controversy or remove uncertainty," answer the following queries:

> 1. Has the Interstate Commerce Commission the requisite authority, and if so under what specific provisions of the Interstate Commerce Act, to award reparation for damages resulting from the utilization of available administrative and court procedures, in bad faith or without probable cause, knowingly or recklessly misrepresenting facts therein and making misleading statements of facts therein, multiplying and protracting proceedings thereunder, in bad faith or without probable cause, not for the purpose of obtaining settlement of issues but with the intended effect of continuing and creating doubts and uncertainties, all for the purpose of preventing future diversion of all-rail traffic to Seatrain?

2. Has the Interstate Commerce Commission the requisite authority, and if so under what specific provisions of the Interstate Commerce Act, to require railroads which do not participate in and maintain through routes with Seatrain to permit interchange of their freight cars with Seatrain and permit the use of such freight cars in connection with transportation via Seatrain in interstate commerce?

Respectfully submitted,

Seatrain Lines, Inc.,
15 Broad Street,
New York 5, New York,

By: S. S. Eisen,
140 Cedar Street,
New York 6, New York,
Its Attorney.

March 6, 1953

Certificate of Service

I hereby certify that I have this day served a copy of the foregoing document upon all parties to this proceeding by mailing a copy thereof to each party of record.

Dated at New York, New York, this 4th day of March, 1953.

S. S. Eisen.